No. 94-20212

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID WAYNE SPENCE,

Petitioner-Appellant

v.

WAYNE SCOTT,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellee

On Appeal From the United States District Court
For the Southern District of Texas
Houston Division

MEMORANDUM IN SUPPORT OF PETITIONER'S APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL

RAOUL D. SCHONEMANN
(Counsel of Record)
KEN D. DRIGGS
ROBERT C. OWEN
Texas Resource Center
1206 San Antonio Street
Austin, Texas 78701
(512) 320-8300

J. PATRICK WISEMAN
Wiseman, Durst & Tuddenham
1004 West Avenue
Austin, Texas 78701
(512) 479-5017

Counsel for Petitioner-Appellant

INTRODUCTION

> **I didn't commit these crimes and anything I said about anybody else [is] just a lie. I can't say that because I wasn't there.**
>
> -- Gilbert Melendez, David Spence's co-defendant and central prosecution witness against Mr. Spence at his 1985 Brazos County capital trial, during sworn testimony on July 16, 1993.[1]

> **As far as I am concerned, Truman Simons is not a trustworthy individual.**
>
> -- Larry Scott, Waco Chief of Police at the time of the Lake Waco Murder investigation, during sworn testimony on April 28, 1993.[2]

After obtaining a capital conviction and death sentence against David Spence at his McLennan County trial in 1984, the State prepared to prosecute the other man whom McLennan County Deputy Sheriff Truman Simons and District Attorney Vic Feazell had pledged would die for the Lake Murders: Muneer Deeb. Taking full advantage of the death sentence secured against Spence, Simons concentrated on developing the remaining co-defendants, brothers Gilbert and Tony Melendez, as witnesses against Deeb.

Simons revealed for the first time in the proceedings below that the initial cooperation of Gilbert Melendez -- the first of

---

[1] Transcript of deposition of Gilbert Melendez (taken July 16, 1993, CA Nos. H-91-3718, H-92-117) at 169. Hereinafter, all citations to the depositions admitted in the District Court proceedings in this case will indicate the name of the witness in small capital letters, with the page following (e.g. "MELENDEZ at 169").

[2] SCOTT at 86.

the co-defendants to give Truman Simons a statement -- was induced by plea offers that included the possibility of immunity from prosecution. Because Gilbert refused to testify for the prosecution at Spence's McLennan County trial, however, the State later "upped the ante," eventually getting both brothers to plead guilty to two counts of murder in exchange for not seeking the death penalty.[3] As part of his deal, Gilbert Melendez testified against Deeb at his March 1985 capital murder trial. Later that year, both Melendez brothers testified against Mr. Spence at his second capital murder trial.

As demonstrated in the proceedings below, Gilbert Melendez' first statement was patently false -- a clumsy fabrication based on information Melendez had acquired in jail and from Simons himself. Shortly after taking the statement, however, Simons realized that Melendez' account was inconsistent with indisputable facts and circumstances surrounding the offense. Rather than rejecting Melendez' statement outright for its obvious falsity, however, Simons proceeded to lead Melendez through a series of revisions of the statement, each time amending it to conform to established facts that Simons had learned since the previous version. This protracted process -- which included numerous visits to the scene of the crime so that Melendez could familiarize himself with its layout -- culminated in the fabrication of Melendez' eventual testimony against

---

[3] Both co-defendants received two life sentences in exchange for their guilty pleas. No disposition has ever been entered in the third case, relating to the murder of Raylene Rice.

Spence.

In remarkable testimony below, Gilbert Melendez -- fully cognizant that he could be prosecuted for capital murder, as well as aggravated perjury, for what he was about to say -- admitted that his trial testimony against Mr. Spence was false and revealed in detail how it was revised, crafted, and shaped by Truman Simons.

The proceedings in this case -- like those pertaining to Mr. Spence's first capital murder conviction in McLennan County -- presents a fundamental challenge to the integrity of the process that led to David Spence's conviction and sentence of death. Predicated on false testimony manufactured by the State and handicapped by the suppression of credible exculpatory evidence that would have enabled the defense to expose the State's witnesses as liars, Mr. Spence's conviction in this case, no less than its companion case, demands the extraordinary remedy of federal habeas corpus relief. Again, as a necessary first step in that direction, a certificate of probable cause must issue.

INTRODUCTORY FACTS

I. The State's Investigation Concerning the Development of Gilbert and Tony Melendez' Testimony Against David Spence

In March 1983, prior to Mr. Spence's McLennan County trial, Gilbert Melendez first provided incriminating statements to Truman Simons. Although these statements are materially inconsistent with demonstrable facts and although Melendez himself recanted them months later, entering a plea of "not

guilty" after his indictment, it is necessary to briefly review the facts related to Melendez' initial decision to cooperate with Simons in order to understand how and why Simons assisted Melendez in the fabrication of additional statements and testimony that were later introduced against Spence.

In September 1982, nearly two months after the commission of the murders at Lake Waco, Gilbert Melendez and David Spence were arrested and charged with aggravated sexual assault in connection with an incident wholly unrelated to the murder case. At the time of their arrest, neither man's name had surfaced in the Waco Police Department's extensive investigation into the Lake Murders, nor had any person at Koehne Park observed anyone on the night of the murders matching either man's description. SALINAS at 140. Just two days after their arrest, however, Spence and Melendez came under almost immediate suspicion due to a twist of fate: On September 11th, Truman Simons was assigned to the murder case, fixing his suspicions on Muneer Deeb -- a casual acquaintance of Spence's -- by the following morning.[4] Two days later, Simons arrested Deeb and charged him with capital murder.

Although Deeb was released from custody after passing a

---

[4] As Simons reasoned: "I always felt like that Deeb had something to do with it. And I felt like that if Deeb had something to do with it there wasn't but two other alternatives: That was either David Spence ... or some of Muneer Deeb's Arabic friends." SIMONS I at 51. Simons, however, never conducted any investigation into the possibility that any of Deeb's "Arabic friends" were involved in the murders. Id. at 52 (suggesting that the Arabs were dropped as suspects because "if some of the Arabs had been involved in it we were never going to hear anything").

police-administered polygraph exam a week later, Spence and Melendez remained in custody. It was no coincidence, therefore, that when Simons quit the Police Department days later, he promptly sought employment as a jailer; as he testified below, "I wanted to get over to the jailhouse where David Spence was." SIMONS I at 21.

In November, shortly before Spence was scheduled to go to trial on the assault case, Gilbert Melendez was bench-warranted from the Texas Department of Corrections back to the McLennan County Jail. MELENDEZ at 18; SIMONS II at 9. According to Melendez, when he first returned to the jail, Simons called him out and advised him that he was a suspect in the Lake Waco murders, but Melendez told Simons that he "didn't know anything about it." MELENDEZ at 19.

As the assault case against Mr. Spence proceeded to trial, Simons called Melendez out of his cell several more times and attempted to question him about the murders. Id. During these meetings, Simons showed Melendez "different parts of what supposedly were statements" and played for him "a piece of [audio]tape that someone had made some kind of statement on." Id. at 19, 138. Melendez thus learned that inmates were claiming they had heard Spence make statements about the murders, incriminating both Spence and Melendez. Id. at 19. In response, Melendez "still told Mr. Simons that I didn't know anything about the murders and if anyone was saying anything concerning me that it was not true." Id. at 20.

During subsequent meetings with Melendez, Simons employed a variety of psychological ploys to induce Melendez to provide him with a statement. Among other tactics, Simons led Melendez to believe that Spence and Deeb were each on the verge of giving confessions that would blame Melendez for the crimes.[5] MELENDEZ at 21. According to Melendez, Simons told him that "if they received a statement and I was [] implicated in it, that they would file charges on me whether I did it or not." Id. Simons told Melendez that "there would be some kind of deal worked out with whoever came first with a statement." Id. at 22. Particularly after Spence was convicted on the aggravated assault charges, Melendez became increasingly concerned that Spence would be the first to accept Simons' "deal," leaving Melendez to face a certain death penalty.

After several more sessions with Simons, Melendez finally asked Simons "what kind of a deal was he talking about." MELENDEZ at 23. According to both Simons and Melendez, Simons replied that "the first person that gave a statement would receive immunity from prosecution from all charges."[6] Id. at 23. After District Attorney Vic Feazell himself verified Simons' promise of

---

[5] These representations by Simons were false, and no doubt calculated to induce Melendez to incriminate Spence. In fact, neither Spence nor Deeb ever provided law enforcement officials with any statement admitting their involvement in the murders.

[6] The remarkable fact -- never previously disclosed to Mr. Spence -- that immunity from prosecution was originally discussed as part of a possible plea agreement with Melendez was confirmed by Truman Simons in sworn testimony in the proceedings below. SIMONS II at 29-30.

immunity, Melendez finally agreed to give Simons a statement about the case. MELENDEZ at 25-26, 28; SIMONS II at 29-30.

To produce the first statement, Melendez met with Simons alone in one of the offices of the McLennan County Sheriff's Department. According to Melendez, the first statement was part wholesale invention and part based on "general information" about the crimes that he had acquired from other inmates and from Simons himself.[7] MELENDEZ at 28.

---

[7] To be sure, at the time Melendez made his first statement, talk about the murders was rampant throughout the jail. For example, according to Melendez' notes, Melendez met an inmate named "Rick" in late 1982 who told Melendez that he had seen the victims in the presence of persons in a "blue Monte Carlo" at around 10:30 p.m. on the night of the murders and, later, according to Melendez, in the presence of another person in a "purple or burgundy" Thunderbird. Exhibit 108, document #6 [or Tressa Granger No. 17]. Because this information is corroborated by a substantial quantity of evidence that the police gathered indicating that two similarly-described vehicles were seen in the Park near the victims' Pinto on the night of the murders by several different witnesses (including one named "Ricky Pate"), there are strong indicia that what "Rick" told Melendez he saw in Koehne Park that night was accurate. See Post-Hearing Brief at 42-47 (documenting sightings of Kenneth Franks in the company of suspect Robert Freuh in a "maroon" car late on the night of the murders; also reports of a "blue Plymouth Duster" in the Park at this same time); see also Exhibit 7 at 1, 3 (report corroborating sighting of "blue Chevy" in Koehne Park near victims); Exhibit 18 at 1-3 (reporting that Ricky Pate saw Ken Franks in a "maroon Lincoln" on the night of the murders); Exhibits 27, 28 (reporting other sightings of blue car and driver of Lincoln Continental).

At the same time, this information is fundamentally inconsistent with the notion that Spence and the Melendezes were responsible for the murders, since it places the victims in the presence of persons other than the defendants late on the night of the crime. Nevertheless, Melendez apparently borrowed part of "Rick"'s account -- the part that was not inconsistent with his own guilt -- in fabricating his first statement. Thus Melendez appropriates Rick's account of how somebody he knew had gone with the victims to buy more beer and that "the guy said they had to hurry to make it before they stop selling beer [at] 12:00." Exhibit 108, document #6 [or Tressa Granger No. 17]. These words

Melendez and Simons talked for "at least a couple of days, maybe more," before deciding to make a tape-recorded statement.[8] MELENDEZ at 29. According to Melendez, by the time they decided to make the recording they had "been over [the statement] so many times that it was like a rehearsed account of it." MELENDEZ at 31-32.

From an adjoining office and by virtue of a two-way mirror and a loudspeaker, Waco Police Lt. Marvin Horton witnessed Simons' and Melendez' rehearsal and tape-recording of this first statement. According to Horton's testimony, at one point Simons interrupted Melendez' account and turned off the tape recorder so Melendez could "get our story straight":

> Horton Truman was talking to him and then at one time he says, "We are going to turn the recorder off and then we are going to get our story straight and we will turn it back on."

---

find their way into Melendez' subsequent statements to Simons, as Melendez claimed that the victims agreed to get into Spence's car in order to go buy beer, because "we still had time to go by the store and buy some more." Exhibit 100 at 4 (tape-recorded statement); see also Exhibit 101 at 1 ("we could get some more befor[e] the store closed"). This example demonstrates how Melendez used information that he had learned about the events from other inmates in the jail to invent his first statement.

[8] Simons, however, claims that he only spent "three or four or five minutes at most" talking to Melendez before a tape recording was made. SIMONS II at 13. This assertion, however, is belied by his own testimony: He first talked to Melendez in a booking area of the jail "around 4:00 in the afternoon," SIMONS II at 11, and then took him over to Sheriff Harwell's office to receive statutory warnings "right at 5:00," which he recalls because "everybody normally leaves at that time." Id. at 13. In the transcription of the tape recording of the statement taken on that day, however, Simons announces, before Melendez begins speaking, that "[t]he time is 9:14 P.M." Exhibit 100. Hence, five hours had passed since -- according to Simons' own testimony -- he had first retrieved Melendez for the interview.

Q And what did you take that to mean?

A [I] took it to mean that he was going to sort of lead him down and tell him how to tell what he wanted to tell, you know, what he wanted to hear.

Q And, in fact, did he turn the recorder off for a period of time?

A Yes.

Q And did they continue to discuss the case and the facts of the case?

A Yes. They talked about the case.

Q And then did they go back to the recorder?

A Turned it back on.

Q And did he ask further questions of Mr. Melendez?

A Yes, he did.

Q And did Sergeant Simons seem to like those answers better than he liked --

A Apparently, he did, yes.

HORTON at 27-28.

As Simons came to realize, however, many of the details of Melendez' first statement were not consistent with readily demonstrable facts and circumstances of the crime. For example, in his first statement, Melendez had said that he and Spence had taken Spence's "white older model station wagon" to the Park that night, see Exhibit 102 at 1; Simons, however, subsequently learned that Spence did not own the station wagon until weeks after the murders. In addition, Melendez said that he and Spence had arrived at the Koehne Park that night at "about 11:30 p.m.," and that it was "after 12:00 midnight" when they set out for Speegleville Park to deposit the bodies, see Exhibit 102 at 1, 5;

gates to Speegleville Park, however, closed nightly at 11:00 p.m. Thus, two weeks later, Simons returned to Melendez to take another statement, making numerous revisions in the first statement to conform to the facts Simons had learned in the intervening period. See infra, Section II.

In conjunction with the process of amending the statements, Melendez accompanied Simons on numerous visits to Koehne and Speegleville Parks. On the first such trip, Simons and Police Sgt. Dennis Baier took Melendez to Koehne Park to have him demonstrate where he and Spence had met the victims and to describe how the crimes had unfolded. Instead of taking Simons to the "Circle" area where the victims' car had been abandoned, however, Melendez took them to an area on the opposite side of Koehne Park -- the "wrong" location, but clearly the same place that he had described in his first statement.[9] Simons was plainly disconcerted by Melendez' failure to take them to the correct area, since he "kept asking [Melendez] if [he] was sure" of the location. MELENDEZ at 60. When Melendez told Simons he was sure of the spot, Simons "didn't seem like he agreed with that too much." Id. As Melendez recalls:

> You know, I didn't have any idea. I just guessed it. And that's the part [of the

---

[9] As Melendez' April 7, 1983, statement read: "We crossed the main road into [Koehne] Park, turned to the right and then back to the left and drove to the bottom of the hill where the pavement meets the water." Exhibit 103 at 2. It was near this location described in the statement -- "where the pavement meets the water" -- that Melendez then claimed that the crimes occurred. See MELENDEZ at 61-63, 74-79; see also Exhibit 7 to MELENDEZ Deposition [aerial photograph with indications].

> Park] that I was thinking of when I gave them this [first] statement and took him out there to show him where supposedly it happened.

MELENDEZ at 60, 61.[10]

Simons and Melendez, accompanied by Captain Dan Weyenberg, went on a similar trip to Speegleville Park so that Melendez could identify the locations where he and Spence had supposedly left the victims' bodies. After driving out to the general area where the bodies had been found, Simons had Melendez walk around the area in an effort to point out their specific locations. Id. at 83. Because, as Melendez explained, he "didn't have any idea where these bodies were," he aimlessly walked back and forth in the area, attempting to follow "cues" that Simons provided him. Id. at 84. Eventually, in apparent exasperation Simons gave up and just showed Melendez where the bodies had been found; as Melendez explained:

> Well, I walked back and forth. And the road went a pretty good ways in each direction. And once I got a pretty good ways in an area that they weren't found, then Truman Simons would say, "Well, I think we have come far enough. This is -- Are you sure it's this far[?]" you know, "Do you want me to go in the other direction? Do you remember if maybe if you walked --"
>
> So what I did is walked both directions

---

[10] Later, when Simons and Melendez revised these initial statements in preparation for Melendez' testimony against Deeb, Simons persuaded Melendez to change his statement so the scene of the crime was closer to the location where the victims' car had been found. As Melendez explained, the original location was a "hang-out area" where "a lot of people" would have been, who would have recognized the defendants or their vehicle. MELENDEZ at 79. Thus, Melendez followed Simons cues and agreed to change the location to a wooded area located closer to the Circle where the victims' car had been left. Id. at 79-80.

> end to end. I didn't have any idea. I was just looking around.... So what happened was after a few times of walking back and forth Truman Simons said, "You don't remember where you put the bodies at?" And I told him, "No, I don't remember."
>
> And he said, "Come here. I am going to show you."
>
> I walked behind him to a [grassy area where he] had moved the grass and there were two posts sticking up with a little tag on it.... [He] said, "This is where one person was and this is where the other person was. Do you remember?" And I told him I didn't remember.
>
> So he asked me about the third body. And I had no idea. So I walked around and I just finally told him I didn't have any idea where it was. So he took me over to the area and showed me where that body was.

MELENDEZ at 84-85; <u>see</u> <u>also</u> <u>id</u>. at 148-49.[11]

Ramon Salinas accompanied Simons and Melendez on a similar visit to Speegleville Park in an effort to locate any physical evidence that might corroborate Melendez' statements. MELENDEZ at 85-86. According to Salinas' sworn testimony below, Melendez' apparent lack of familiarity the area and his inability to recall any of the alleged events left a distinct impression with

---

[11] Simons described this occasion similarly in his deposition:

> And we drove down that dirt road. And we got up to the fork in the road and he directed us to stop there, and we got out. And there were still boards and stakes in the ground where the bodies had been found that day. And Gilbert walked -- got out and walked around and he kept talking about it was real dark out there that night, which, you know, it's a real thick wooded area. But he walked right past those stakes.

SIMONS II at 26.

Salinas:

Q Were you impressed by Gilbert Melendez' familiarity with the area [of Speegleville Park where the victims bodies were found]?

Salinas No, sir.

Q Did that raise in your mind at that time some doubts about whether Gilbert was in fact guilty?

A Yes.

Q And do you maintain those doubts today?

A Yes, sir, I do.

Q And would that [also be] the case for Tony Melendez and David Spence and Muneer Deeb?

A Yes.

SALINAS at 105-06.

Despite the fact that the lead detective assigned to the investigation harbored doubts about the guilt of all of the defendants, the State proceeded with its plans to secure an additional conviction and death sentence against Mr. Spence.

II. The State's Evidence of Guilt at Mr. Spence's Brazos County Trial

Due to Tony and Gilbert Melendez' willingness to testify against Mr. Spence at his Brazos County trial, the State presented significantly fewer witnesses against him than it did at his McLennan County trial. The State's case essentially involved three categories of evidence: (1) evidence of bite marks discovered on the bodies of the victims that were identified by forensic odontologist Homer Campbell as having been

caused by Mr. Spence's teeth; (2) a single inmate witness, David Puryear, who testified about incriminating statements Spence allegedly made to him while the two were inmates in the McLennan County jail and about a bandana Puryear made for Spence; and (3) the co-defendant testimony of Gilbert and Tony Melendez providing detailed -- yet contradictory -- accounts of the murders. Because Mr. Spence's claims for relief challenge the integrity of each of these categories of evidence, a brief review of the State's case is necessary.

The only forensic evidence implicating Mr. Spence in the crimes consisted of alleged "bite marks" found on the bodies of Jill Montgomery and Raylene Rice. Pathologist M.G.F. Gilliland, M.D., testified that she had conducted autopsies on the bodies of the victims, and opined that the bite marks on the bodies of Rice and Montgomery had been inflicted near the time of their deaths.[12] Dr. Homer Campbell, a private consultant in forensic dentistry, testified that he had examined impressions of Mr. Spence's teeth, taken pursuant to court order. Dr Campbell acknowledged that he had used enhanced photographs of the alleged bite marks on the bodies of Jill Montgomery and Raylene Rice, rather than the wounds themselves, to measure against the

---

[12] On cross-examination, Gilliland acknowledged that she initially did not recognize any bite marks on the bodies of the victims at the time of the autopsies and described these injuries as "shallow stab wounds" in her autopsy report. S.F. XVIII at 4626. She admitted that it was not until prosecutor Ned Butler called her in January 1984 -- a year-and-a-half after the crimes -- that she changed her opinion and concluded that these wounds were actually consistent with bite marks upon further review of the autopsy photographs. Id. at 4633-34.

impressions made by Mr. Spence's teeth. Based on this comparison, Campbell offered the opinion that the bite marks on the bodies of Jill and Raylene were produced by Mr. Spence's teeth. Statement of Facts Volume XX at 5042.[13]

Although the State's case relied heavily on inmate witness testimony at Spence's 1984 trial in McLennan County, the prosecution recalled only a single inmate witness to testify against Spence in his subsequent Brazos County trial. David Puryear testified that while in the McLennan County Jail awaiting transfer to the penitentiary, he met Spence, who was known to the other inmates as "The Texas Outlaw." S.F. Vol. XXI at 5411. At that time, Spence had not been indicted for the lake murders, but was being held on an unrelated charge. Puryear testified that Spence, who was then a suspect in the lake murders, first denied involvement in that case; later, however, Spence told Puryear that he had committed the murders but did not know why he had done so. Id. at 5414. Puryear also testified that one day after Spence was returned to his cell from an unknown location, he appeared to be extremely upset. Spence stated aloud, to no one in particular, that "they had showed him pictures of the lake murders [and] that he had done the crime and he was glad that he did it and he liked it." Id. at 5418.

---

[13] Hereinafter, citations to the Statement of Facts in the trial record below will follow the citation form "S.F. Vol. __ at __." Citations to the voir dire proceedings below will follow the form "S.F. Vol. (voir dire) __ at __." Finally, citations to proceedings in the trial court after the cause was remanded from the Texas Court of Criminal Appeals will follow the citation form "R.H. Vol. __ at __."

Puryear also testified that, on his own, he drew a picture of a pistol on a homemade bandanna, added the words "The Texas Outlaw," and gave it to Spence as a gift. S.F. Vol. XXI at 5410. Later, at Spence's suggestion, Puryear added pictures of two women to the bandanna -- one with blonde hair and one with dark hair.[14] Id. at 5412. However, Spence never said anything to Puryear suggesting that these drawings or the hair colors depicted were related to Jill Montgomery or Raylene Rice. [15]

Without question, the heart of the State's case at the Brazos County trial was the co-defendant testimony of Gilbert and Tony Melendez. Gilbert Melendez testified that during the early evening of July 13, 1982, he, his brother Tony, and David Spence had driven to Koehne Park in Spence's car. S.F. Vol. XX at 5185. According to Gilbert, Spence hailed a girl who was accompanied by another girl and a boy. Id. at 5191. Spence and Tony Melendez went over to talk to the trio, and the group all agreed to go get more beer together. Id. at 5192. Gilbert, Kenneth and Raylene got in the back seat of Spence's car; Tony, Spence, and Jill Montgomery were in the front seat, with Spence driving. Id. at 5193. Before the car left the park, Spence made comments about Jill's breasts and attempted to grab them; when she protested, he stopped and pulled the car into the woods, where everyone got out

---

[14] Jill Montgomery had dark hair; Raylene Rice had blonde hair.

[15] Defense counsel's cross-examination of Puryear left the impression that the hair colors could have related to the hair colors of Spence's wife, his ex-wife, or his girlfriend, rather than Montgomery or Rice.

of the car. Id. at 5199-5201. After the group exited Spence's car, Spence accused them of "ripping off some dude," which the trio denied. Id. at 5208.

Spence drew a knife and ordered the girls to undress, which they did; he then took Jill Montgomery off into the woods, directing Gilbert to take Raylene Rice and Tony to watch Ken Franks. S.F. Vol. XX at 5209. Gilbert then got back into the car with Rice, and raped her. Id. at 5221. He then traded places with Tony and stood guard over Franks, kneeling next to where Franks was sitting on the ground. Id. at 5225. Spence, meanwhile, was sexually assaulting Jill Montgomery; at some point, Gilbert was ordered to walk over to where Jill was lying and "watch" her, as Tony took over again guarding Franks and Spence got into the car with Rice. Id. at 5230. After Spence raped Rice, he returned to where Jill was lying; on the way there, he handed Gilbert some money, which Gilbert later claimed to amount to "four or five hundred" dollars. Id. at 5235. While Gilbert stood at a distance, Spence apparently struggled with Jill; after she fell still, he returned to the car. Id. at 5237-38.

Back at the car, Spence shouted at Franks and began to "poke" him with the knife, quickly intensifying the blows into hard stabs as Franks was pinned against the car. S.F. Vol. XX at 5240-42. After being stabbed repeatedly, Franks fell forward, gasping for air, and was pushed aside to the ground by Spence. Id. at 5243.

Spence then told Tony Melendez to get Rice out of the car. While Gilbert watched, Spence demanded that Tony stab Rice; she made a "sudden move" and Tony hit her and stabbed her with Spence's knife. She, like Franks, slumped to the ground after being stabbed. S.F. Vol. XX at 5247-48.

Gilbert then warned Spence that they should "get out of there." Spence insisted that they move the bodies, in case anyone had seen them together with the victims. Gilbert and Tony took Spence's car to get Gilbert's truck, while Spence waited with the bodies. S.F. Vol. XX at 5252. After they dropped off Spence's car at his mother's house, Gilbert and Tony returned in Gilbert's truck to find Spence in "the circular area" of Koehne Park. While Tony stood guard, Gilbert and Spence went into the woods and loaded the bodies into the truck. Id. at 5255.

According to Gilbert, he drove his truck, at Spence's direction, to Speegleville Park on the other shore of Lake Waco. S.F. Vol. XXI at 5258. Once there, Tony again "kept watch" while Gilbert and Spence unloaded the bodies of the two girls. Id. at 5267. Spence unloaded Franks' body himself; Gilbert, overcome with nausea, was vomiting and unable to assist him. Id. at 5271.

Later, Gilbert drove Spence back to his mother's residence and dropped him off; before leaving Spence, Gilbert gave Spence two-thirds of the money that Spence had previously given Gilbert, with Gilbert keeping the remaining third. According to Gilbert, Spence was to have given Anthony his third; Gilbert was uncertain whether Anthony ever received any money from Spence. S.F. Vol.

XXI at 5275. Gilbert told Spence that he was leaving town, but Spence told him to wait because Spence was "supposed to get some money." Spence did not tell Gilbert why or from whom he was going to get this money. Id. at 5276.

Gilbert acknowledged that he did not leave Waco. He also testified that a couple of weeks later, he and Spence visited Muneer Deeb in Waco so that Spence could obtain money from Deeb. Gilbert did not know, nor did Spence tell him, why Deeb was in debt to Spence. S.F. Vol. XXI 5278-81.

Tony Melendez' account differed in numerous particulars from the version told by his brother. First, according to Tony, the victims were not already at Koehne Park when he, his brother, and Spence arrived; instead, he claimed that they, already in the park, encountered the victims for the first time when the victims drove into the park in their orange Pinto. S.F. Vol. XVIII at 4720. At Spence's wave, the orange Pinto came to a stop and Ken Franks exchanged words with Spence, after which Spence announced that they were going to follow the Pinto to the paved circular area and "party" with its occupants. Id. at 4721. According to Tony, they spent the next two hours drinking beer and smoking marijuana with the three teens, before deciding to go together for more beer. Spence, Jill, and Franks were in the front seat; Tony and Gilbert sat in the back seat with Rice between them.

Although Tony, like Gilbert, recalled that an argument broke out between Spence and Montgomery, his account of what happened after Spence pulled into the woods and stopped the car was

strikingly different from his brother's. According to Tony, everyone but Franks got out of the car; Franks exited only when Spence came around to the door and shouted at him. S.F. Vol. XVIII at 4725. Then, Spence pulled his knife on Franks and told him that he was going to "get even" with him, pushing him to the ground and leaving him lying there as Spence walked off into the woods with Jill Montgomery. Id. at 4728-30.

Rather than staying with Franks (as Gilbert testified he had), Tony testified, he wandered out nearer to the road to "see if anybody was coming," then walked over to where Spence and Jill were; Spence then gave Tony his knife and told him to bring Franks over to where Jill was. When Tony returned with Franks in tow, Spence was raping Jill; after he did so, Tony raped Jill while Spence stood aside with Franks, watching. S.F. Vol. XVIII at 4733-37.

Spence then took Franks back to the car; after the pair left, Tony stopped raping Jill and walked back toward the car. There, Spence told him that Rice was in the back seat; Tony got into the car with her. S.F. Vol. XVIII at 4738. At that point, according to Tony, Spence and Gilbert walked off toward where Jill was lying; Tony claimed to have had no idea where Franks was at that point. Id. at 4739. After raping Rice, Tony got out of the car and both Spence and Gilbert were there. David told Gilbert to remain with Rice, and he and Tony returned to Jill. Id. at 4741. According to Tony, David began to stab Jill and Tony, at Spence's urging, did likewise; at some point during the

stabbing, Spence bit Jill on the breast.[16] Id. at 4742-46.

Tony got up and walked away from where Jill's body lay; he recalled seeing Ken Franks' body sitting upright next to a tree, with his "head down" and a "big stained spot on his shirt," not moving. S.F. Vol. XVIII at 4747. Next, he said, Spence pulled Rice to the ground and stabbed her on the ground, "right next to the car." Id. at 4748. Tony and Gilbert then got into the car and "took off," leaving Spence with the bodies. They retrieved Gilbert's truck, dropped off David's car at his mother's, and returned. Id. at 4751-53.

Upon their return, the three loaded the bodies into Gilbert's truck and headed for Speegleville Park. S.F. Vols. XVIII and XIX at 4754-58. In contrast to Gilbert's testimony, Tony recounted that Franks' body was the first removed from the truck, and that Gilbert had assisted Spence in moving it. S.F. Vol. XVIII at 4758. The two girls' bodies, according to Tony, were removed only after Franks had been placed against a tree. The three then drove back to Waco, where Tony was dropped off. S.F. Vol. XVIII at 4759-60.

III. The evidence the defense presented at trial

In his defense, Mr. Spence asserted that he was not the person who committed the murder of Kenneth Franks and that the testimony presented by the State's star witnesses, Gilbert and

---

[16] Gilbert had not mentioned his brother's participation in the stabbing of Jill Montgomery.

Anthony Melendez, was false.

In their opening statement to the jury, defense counsel emphasized that the State's case depended almost wholly upon the credibility of the two co-defendants, Gilbert and Tony Melendez. Throughout the trial, Mr. Spence attempted to demonstrate that the stories presented by the Melendez brothers were untrue, and that their testimonies were simply two of numerous divergent and inconsistent accounts of what they claimed happened the night of the murders. The defense also asserted that because none of the other evidence presented at trial provided any corroboration, the Melendez brothers' testimony must be false.

The defense presented the testimony of several witnesses who contradicted the Melendez brothers' stories in significant respects. Three witnesses -- Martha Turner, Ricky Guthrie, and Kenneth Young -- testified that they were at Koehne Park on the night of the murders; their observations of events that night were sharply at odds with those of Gilbert and Tony Melendez. S.F. Vol. XXI at 5454-65 (Turner); 5466-72 (Young); 5473-84 (Guthrie). Another defense witness, Calvin Nesbit, was a mechanic to whom Gilbert Melendez had brought his truck for repairs; Nesbit testified that Gilbert's truck was out of commission the night of the murders with three flat tires, a broken ignition switch, and a damaged carburetor. S.F. Vol. XXI at 5487, 5488.

Finally, to rebut the testimony of state odontologist Homer Campbell, the defense called Dr. Gerald Vale, another forensic

odontologist, who testified that his evaluation of the evidence that related to the bite marks "indicated that the amount of evidence suggesting that this may be Mr. Spence's teeth is quite limiting." Dr. Vale, however, also testified that "it is possible [Spence] may have made the mark, but in my opinion, the evidence is not adequate to establish that to any reasonable certainty."[17]

ARGUMENT

I. THE DISTRICT COURT'S ORDER FAILS TO ADDRESS SUBSTANTIAL EVIDENCE THAT THE STATE FAILED TO INFORM THE DEFENSE OF CRITICAL CONDITIONS OF GILBERT Melendez' PLEA AGREEMENT; FAILED TO INFORM THE DEFENSE OF SPECIAL TREATMENT GILBERT MELENDEZ RECEIVED IN THE McLENNAN COUNTY JAIL IN EXCHANGE FOR HIS TESTIMONY; AFFIRMATIVELY ASSISTED GILBERT MELENDEZ IN THE FABRICATION OF HIS SUCCESSIVE STATEMENTS; AND KNOWINGLY PRESENTED THE PERJURED TESTIMONY OF GILBERT AND TONY MELENDEZ AGAINST MR. SPENCE AT TRIAL

In the proceedings below, Mr. Spence demonstrated that Gilbert Melendez and Tony Melendez perjured themselves in their testimony at Mr. Spence's Brazos County trial. The State knew their testimony was false -- McLennan County Sheriff Deputy Truman Simons had actively participated in its fabrication -- yet

---

[17] During closing argument, the defense emphasized the minimal physical evidence presented by the State, claiming it was both circumstantial and of suspect integrity. In particular, the defense argued that Dr. Gilliland's testimony was inconsistent with the accounts of the stabbings of Gilbert and Tony Melendez. According to Dr. Gilliland, the stab wounds were inflicted while the victim was lying down, not standing as Gilbert claimed in his testimony. In addition, the defense pointed out that Dr. Gilliland did not recognize alleged bitemarks until eighteen months after the autopsy was conducted, and only after they were pointed out to her by assistant prosecutor Ned Butler, who has no professional odontological expertise.

the prosecution presented it against Mr. Spence in violation of his fundamental constitutional rights. Because there is a reasonable likelihood that the Melendez brothers' false testimony affected the jury's judgment, and the prosecution knew that their testimony was perjured, Mr. Spence's conviction must be reversed under the Sixth, Eighth, and Fourteenth Amendments. United States v. Aqurs, 427 U.S. 97, 103 (1976); Giglio v. United States, 405 U.S. 150, 154 (1972); Napue v. Illinois, 360 U.S. 264, 270 (1958); Alcorta v. Texas, 355 U.S. 28 (1957).

A. Gilbert Melendez' Testimony Was Given In Exchange For Consideration He Received From The Prosecution And Law Enforcement Officials That Was Concealed From Mr. Spence And His Jury

1. The prosecution failed to disclose that Gilbert Melendez' initial cooperation -- leading to his first statements -- was secured in response to overtures by the District Attorney that included the possibility that Mr. Melendez would be granted immunity from prosecution

In the proceedings below, the State revealed for the first time that Gilbert Melendez was originally told by District Attorney Vic Feazell that he could be granted "immunity from prosecution" if he cooperated with the State and provided a statement to Truman Simons. SIMONS II at 29. Melendez testified that the prospect of immunity was a critical factor in his decision to give his first statement to Truman Simons. This powerful exculpatory evidence, however, was never disclosed to Mr. Spence.

Both Simons and Melendez swore that Feazell mentioned the prospect of "immunity from prosecution" in the initial plea

overtures with Melendez. According to Simons' testimony, Feazell told Melendez "that if he would tell us the complete truth and he didn't actually kill anybody that they could work out a plea bargain arrangement with him to stay away from the death penalty [or] could even get him immunity from prosecution based on his performance or his story."[18] SIMONS II at 29. Melendez testified similarly, stating that Simons told him that "the first person that gave a statement would receive immunity from prosecution from all the charges" and that if he "wanted proof of the immunity he would ask Mr. Feazell to come and tell me personally that he would enforce that." MELENDEZ at 23, 25. When Melendez requested this confirmation, Feazell told him that "if I cooperated, if I knew anything about it, ... and [if] I gave him a statement, that he would enforce the immunity and clear all charges against me." Id. Melendez then provided Simons with the first of a series of statements incriminating himself and Spence in the murders.

It is undisputed that this extraordinary inducement for Melendez to begin cooperating with Simons was never disclosed to the defense before trial. Because this information would have revealed to Mr. Spence's jury how Melendez first came to agree to cooperate with Simons -- and thereby eventually to testify against him -- the State's failure to disclose these facts

---

[18] Melendez claimed in both his first statement as well as his eventual testimony against Mr. Spence that while he assisted Mr. Spence in the commission of the crimes, he did not actually kill any of the victims.

violated Mr. Spence's due process rights under Brady v. Maryland.

The fact that Melendez later forfeited his chances of being granted immunity by failing to continue to cooperate with the State and testify against Mr. Spence at his McLennan County trial does not alter the fact that this information was constitutionally exculpatory evidence that the State was obliged to reveal to the defense. Given that Melendez was not represented by counsel at the time of the proposed offer, which was never committed to writing, it is highly unlikely that Feazell had any genuine intention to grant Melendez immunity in the first place. Nevertheless, because it was a powerful -- in fact, almost certainly determinative -- influence on Melendez' decision to begin cooperating with the State, this information was critical impeachment evidence which would have substantially undermined Melendez' credibility.

The State's failure to disclose its inducement of Melendez' initial cooperation by offering him immunity was highly prejudicial to Mr. Spence and requires reversal of his conviction. To the extent that Melendez' testimony had any credibility at all, it was because Melendez incriminated himself in the crimes as well as Spence. Consequently, in order to effectively impeach Melendez and mount his defense of innocence, Spence had to demonstrate that Melendez' testimony was wholly fabricated: that Melendez was lying about his own involvement, as well as Spence's, in the crimes. If the State had disclosed the fact that Melendez was offered immunity in exchange for his

initial cooperation, Spence could have demonstrated that the only reason Melendez falsely incriminated himself in the crimes was because he faced no penalty for doing so. Cross-examination of Melendez about the terms of the plea offer he actually received (two life sentences in exchange for guilty pleas) could not accomplish that. Only by concealing the facts surrounding the initial inducement that led to Melendez' cooperation was the prosecution able to prevent Spence from showing that Melendez had falsely incriminated himself in the crime.

Because Simons' and Melendez' disclosure of these facts were made during depositions taken after the District Court had written its Order, the Court's Order fails to address the State's suppression of this information. Consequently, this Court should grant a certificate of probable cause to review these facts, and then remand the cause to the District Court for appropriate findings.

2. Respondent admitted below that the State made oral promises to Gilbert Melendez not to oppose his release on parole as part of his plea bargain, and therefore in exchange for his testimony against Spence -- promises that were never previously disclosed to the defense

In the District Court proceedings below, Respondent admitted that State agents made oral promises to Gilbert Melendez that they would not "protest" Melendez' release on parole when he became eligible if he testified against Mr. Spence.[19] These

[19] In response to a March 19, 1993, order of the District Court requiring Respondent to provide certain materials as

promises -- which he believed substantially enhanced his chances of release on parole -- provided a powerful incentive for him to plead guilty and testify against Spence, yet were never disclosed to Mr. Spence or the jury that assessed Melendez' credibility and sentenced Spence to death. Nevertheless, despite Respondent's admission of this straightforward violation of Giglio, the District Court's Order fails to address these facts at all.

As Truman Simons acknowledged in his deposition, oral promises were made to Gilbert Melendez -- as part of Melendez' plea agreement -- that were never committed to writing and never revealed to Mr. Spence:

---

discovery to Petitioner, William Zapalac, counsel for Respondent, acknowledged:

> Truman Simons [and] Vic Feazell orally promised Gilbert Melendez that they would not protest his release on parole when he became eligible.... Mr. Feazell and Mr. Simons have kept their agreements and have not registered a position on the question of Melendez' parole.

Letter from William C. Zapalac to J. Patrick Wiseman, dated April 8, 1993.

While acknowledging that such undisclosed promises were made, Respondent argued below that these promises were "personal assurances only" and not binding on the State. Plainly, no such distinction is recognized when state agents make such promises to a prosecution witness. See Screws v. United States, 325 U.S. 91 (1945); United States v. Tarpley, 945 F.2d 806 (5th Cir. 1991); United States v. Davila, 704 F.2d 749 (5th Cir. 1983); Brown v. Miller, 631 F.2d 408 (5th Cir. 1980); Freeman v. State of Georgia, 599 F.2d 65, 69 (5th Cir. 1979). In short, the elements of Mr. Spence's Giglio claim are undisputed: Promises were made to Gilbert Melendez by state agents -- indeed, by the lead investigator and District Attorney -- as part of his plea agreement which were not disclosed to Mr. Spence. Giglio and Brady demand no more.

Simons: [A]nother deal on the plea bargain arrangement [with] Gilbert was there was an agreement that I personally, the sheriff or Vic Feazell, would not protest [Gilbert's] parole....

Q: Was that agreement memorialized in a writing somehow?

A: No.

Q: This was just a verbal understanding?

A: Just a verbal understanding between his lawyers and the D.A.'s office.

SIMONS I at 82.

Mr. Melendez, in fact, understood these oral promises by Simons and Feazell to go even farther:

> My understanding was that I could not -- I could not get that down in writing. But giving me their word that I was -- could not be guaranteed the first parole but they would guarantee me the second parole. They would write the parole board, call the parole board, whatever was necessary to make parole.

MELENDEZ at 132; see also id. at 105 ("they promised me that I would make first parole, if not first parole then second parole").

Indeed, Melendez' understanding of Simons' and Feazell's promises is confirmed by correspondence between Simons and Melendez. For example, in a letter to Gilbert Melendez introduced into evidence in the proceedings below, Truman Simons provided Melendez with the name of "John Claymon" of the "Parole Board," along with the names and telephone numbers of several prosecutors involved in the cases, under the notation "These are the numbers you need." See Exhibit 109. Simons also informed

Mr. Melendez that his mother had provided him with the name of another person to contact, "but she didn't know where he is from or <u>what I need to do</u>." <u>Id</u>. (emphasis added).

In another letter, Simons wrote to Melendez concerning additional actions he was taking on Melendez' behalf at time of Muneer Deeb's retrial in 1992:

> I finally got [special prosecutor] Bill Lane to call me back, from the way he talked, I don['']t think he knows what's going on. In your letter I can tell that you are hot, but you don['']t say about what. Has anyone from the Parole [B]oard talked to you, if so what did they say or what is going on so I can tell him[?] He said he would call them and let me know what he can find out. He ask[ed] me if I thought you would show up [to testify against Muneer Deeb] [i]f you were out and I told him that I believed that if you said you would that you would be there, that your word has always been good with me....
>
> When I hear from Bill, I will let you know what he has to say[.] Please let me know what is going on <u>so I can see what I can do</u>.

Exhibit 110 (emphasis added).

Finally, in yet another letter introduced into evidence below, Melendez made clear to Simons that he will not testify for the State in the then-pending retrial of Muneer Deeb unless the prosecution finally fulfills its earlier promise to assist him in securing release on parole:

> I feel as [special prosecutor Bill] Lane do[es], I also cannot do anything for him until he do[es] something for me. <u>Promises do not guarantee anything. For sure a verbal agreement is not good enough. I've been through that once already and I've never made parole like I was told I would</u>.

Exhibit 118 at 1.

Whatever the precise terms of the oral promises extended to Mr. Melendez, the undisputed fact remains that such promises were made to Mr. Melendez and were concealed from Mr. Spence and his jury.[20] It is also undisputed that the existence of such promises was never previously disclosed to Mr. Spence, despite the fact that the State was ordered to disclose the terms of any agreements or deals with its witnesses at trial. Because the District Court's Order fails to take any account of these undisputed facts, this Court must grant a certificate of probable cause to review the District Court's disposition of Mr. Spence's Giglio claim.

3. The District Court failed to address evidence -- including photographs showing Gilbert Melendez and his girlfriend in the offices of the McLennan County District Attorney's office -- demonstrating that Gilbert Melendez received special privileges in exchange for his testimony against Mr. Spence

Just as it had treated the inmate witnesses at Mr. Spence's earlier McLennan County trial, the prosecution extended extraordinary benefits and privileges to Gilbert Melendez once he began cooperating with the State. As the evidence demonstrated below, Melendez received special private contact visits in the district attorney's office with his girlfriend, see MELENDEZ at 129-130, 154-155, 167-168, "in exchange for [his] cooperation

---

[20] See REAVES at 43-44 (defense counsel was told that Gilbert Melendez's plea agreement only provided that he would receive life sentences in exchange for his testimony against Spence, and was not aware that Truman Simons and Vic Feazell had made oral promises not to oppose Melendez's parole as part of the agreement). Mr. Reaves represented Mr. Spence at his Brazos County trial.

with the State and [his] testimony against David Spence," Exhibit 152 (affidavit of Gilbert Melendez) at 1. Id. at 2. Photographs taken during these visits provide tangible, concrete documentation that such visits took place, see Exhibits 152, 153, and corroborates the sworn accounts of numerous other witnesses who have attested to receiving similar favors. See, e.g., Exhibits 85, 86, 87, 88, 90, 91, 150.

Because these visits were largely unsupervised, sexual contact between Melendez and his visitor was knowingly countenanced by McLennan County law enforcement officials. As an investigator for the McLennan County District Attorney's Office testified under oath in previous proceedings in this case, Vic Feazell personally instructed him not to supervise such visits. See Remand Hearing Vol. II at 135-137; Post-Hearing Brief at 72-73; Reply at 31. Indeed, Melendez and his girlfriend are shown kissing in what plainly appears to be a law library in one of the photographs taken during their visits. See Exhibit 152.

Although the District Court admitted these photographs into evidence, the Court's Order plainly fails to address these facts or to analyze them in conjunction with Mr. Spence's claims of false testimony. Consequently, this Court should grant a certificate of probable cause to review the District Court's failure to address these claims.

4. The prosecution's failure to disclose promises of leniency and the full extent of the consideration Gilbert Melendez received in exchange for his cooperation and ultimate testimony violated due process

The State's concealed promises of assistance or leniency to Gilbert Melendez were critically important impeachment material that would have enabled Mr. Spence to discredit a central witness against him. As defense counsel for Mr. Spence testified in the proceedings below, had this information been disclosed to the defense, they would have used it to show that Melendez' testimony was false. REAVES at 44.

Undeniably, Gilbert Melendez was a critical witness against Mr. Spence at trial. Mr. Spence's defense to Melendez' testimony was to attempt to show that Melendez was testifying falsely in an effort to avoid the death penalty and to possibly secure eventual release from prison. Because the State's promises to Melendez bore strongly on Melendez' credibility,
the failure of the State to disclose these promises to Mr. Melendez, particularly considered together with the State's suppression of other critically important exculpatory evidence, constitutes a plain violation of Brady and Giglio and requires reversal. See, e.g., United States v. Smith, 480 F.2d 664, 667 (5th Cir. 1973) (prosecution's undisclosed promise not to oppose probation for testifying codefendant violated Giglio and Brady); United States v. Tashman, 478 F.2d 129, 131 (5th Cir. 1973) ("the failure of the Government to disclose to a jury plea bargaining

negotiations with a key witness deprives a defendant of constitutional due process").

B. The District Court Erred In Failing To Address The Substantial Evidence Demonstrating That The State Affirmatively Assisted Gilbert Melendez In The Fabrication Of His Statements To Conform To Demonstrable Facts, And Then Knowingly Presented The False Testimony Of Gilbert Melendez And Tony Melendez Against Mr. Spence At Trial

In support of his allegations that the State knowingly presented the false testimony of Gilbert and Tony Melendez, see Petition at 19-22, Mr. Spence presented compelling evidence below demonstrating that the Melendez brothers' testimony was false. Thus, Mr. Spence has shown how Truman Simons, proceeding from the initial, patently false statement of Gilbert Melendez, carefully revised and amended Melendez' subsequent statements to conform to known facts as Simons learned them. These gradually "improved" statements culminated in a final written account upon which Melendez' trial testimony against Spence was based. A review of the contradictions in these statements demonstrates, however, that this self-impeached evidence is inherently untrustworthy.

Tony Melendez' testimony was likewise false. As a comparison of their testimony demonstrates, the co-defendants' accounts are irreconcilably at odds with basic facts of the events. Moreover, as Mr. Spence also demonstrated in the Court below, Tony's testimony (as well as Gilbert's) is contradicted by an overwhelming quantity of credible evidence that was suppressed by the State. Because the District Court's Order failed to

address or take into account the substantial evidence developed in the depositions below that demonstrates falsity of the Melendez brothers' testimony, this Court should grant a certificate of probable cause to review Mr. Spence's allegations of false testimony.

1. The process of revision of Gilbert Melendez' statements demonstrates that the State, through Truman Simons, actively participated in the manufacture of evidence and testimony against Mr. Spence

As Gilbert Melendez explained in thorough detail in his deposition, once he provided Truman Simons with his original false statement, Simons actively assisted him in revising it so it would not be inconsistent with facts Simons subsequently learned. This process of repeated amendments culminated in a final written account -- no more true than the original statement -- upon which Melendez ultimately based his testimony.

In the days and weeks following Melendez' first statement, Simons learned a number of facts which were inconsistent with Melendez' initial account. One particularly striking inconsistency that Simons spotted was the fact that Melendez had stated that Spence had used a car on the night of the murders that he did not actually own at the time -- a "white older model station wagon." Exhibit 102. In the intervening period, however, Simons learned that Spence did not own a station wagon at the time; he did not acquire the vehicle until later.[21]

---

[21] Melendez explained the need for this change in drafting the second statement:

Instead, Simons learned that at the time of the crimes Spence owned a gold colored Chevy Malibu. Consequently, in the second, revised statement, the reference to the "white older model station wagon" was deleted so that the vehicle described in the statement would not be inconsistent with Spence's Malibu.[22]

Another necessary change regarded the time the defendants supposedly arrived at Koehne Park. As Simons knew from the autopsy report, the victims likely died between 9 p.m. and midnight. Exhibit 84. However, according to Melendez' first statement, "**it was about 11:30 p.m.** [when] we went to a place at the lake called O.6." Exhibit 102 at 1. As Melendez testified, "Mr. Simons said that 11:30 would be too late for some reason. He just said that the time didn't fit in, that it must have been earlier than that." MELENDEZ at 40. Therefore, in the second

---

> In the [first] statement I have a white older model station wagon. Truman Simons came to me later with this statement and told me that I had said a white older model station wagon and that possibly couldn't be right because, according to him, that they found out that in July or around the time of the murders that David did not have a white older model station wagon.

MELENDEZ at 38.

[22] This fact required other changes in the first statement as well. For example, on page 3 of his statement dated March 25, 1983, Melendez stated that "David came around to the blonde **by the back door.**" Exhibit 102. However, once the change from the "station wagon" to the "car" was necessary, the references to the "back door" also had to be altered for the statement taken on April 7, 1983 -- because Spence's Chevy Malibu, unlike the station wagon, was a two-door vehicle and therefore did not have a back door. Hence, the second statement was changed to read "David came around to the blonde **on the passenger side.**" MELENDEZ at 49.

statement, this sentence was edited to read, "**it was about 10:00 - 11:00 P.M.** [when] we went to a place at the lake called O.6." Exhibit 103 at 1.

Another change was necessary to conform Melendez' statement to Simons' then-emerging "murder-for-hire/mistaken identity" theory of the crimes. In the first statement, Melendez had stated:

> There is a turn there[,] we drove through the turn and we were talking. **David Spence introduced them to me** and we said hello and everything and started to drive off.

Exhibit 102 at 1. Simons wanted this line changed as well, because his emerging theory could not account for Spence's having known the victims. As Melendez explained:

> Truman Simons [said] that it wasn't possible for David Spence to introduce them to me or anyone else because they weren't suppose to know David Spence. So he wanted to change it. So we discussed it and he said, "Isn't it possible that everybody introduced themselves?" Because it wasn't possible for David Spence to introduce them to me or anyone else.

MELENDEZ at 44. Hence, to conform to Simons' "mistaken identity" theory of the crimes, Melendez acceded to Simons' proposed changes, amending the statement on April 7 to read:

> There is a turn there, we drove through the turn and we were talking. **We all introduced ourselves** and said hello and everything and started to drive off.

Exhibit 103 at 1.[23]

---

[23] This same rationale required another change in the first statement. Toward the bottom of the first page, Melendez states:

Another significant change in the statements bear note. In the first statement, Melendez had stated: "It was **after 12:00 midnight** when we left [Koehne Park] and started driving [to Speegleville]." Exhibit 102 at 5. The problem with this detail was, as the police had determined earlier, the gate to Speegleville Park was already locked by midnight, making it impossible to get into the park by car thereafter. S.F. (McLennan) Vol. X at 1528.[24] To accomodate this problem in timing, therefore, the revised statement on April 7 contained a forthright amendment: "It was **before 12:00 midnight** when we left [Koehne Park] and started driving [to Speegleville]." Exhibit 103 at 5.[25]

> He asked them if they wanted to get high and drink some beer. We had some and still had time to go by the store and buy some more and **they said OK. The two girls and boy got into the car.**

Exhibit 102 at 1. As Melendez explained, however, Simons did not believe it was credible that "three people that didn't know us [would] just get[] in the car with us." MELENDEZ at 43. Therefore, the new statement was amended to read:

> He asked them if they wanted to get high and drink some beer. We had some and still had time to go by the store and buy some more and **they talked about it between each other and with David. At first it seemed like one was going to go and the other two would stay. Then they all decided to go.**

Exhibit 103 at 1.

[24] Melendez candidly acknowledged in his deposition that he could not remember the exact reason for the change in time period, though he thought "it had something to do with the park had a gate or something that closed or opened." MELENDEZ at 56.

[25] The changes discussed here are only a sampling of the revisions in these statements. For a more complete review of the process of revising the first false statement, see MELENDEZ at 37-

In the period between Melendez' initial statements in 1983 and the trials of Muneer Deeb and David Spence two years later, additional facts had come to light which made even Melendez' revised 1983 statements impossibly inconsistent with known facts. Consequently, dramatic revisions were again necessary. Most importantly, since Gilbert's last statement, the car that Spence owned at the time of the murders (a gold Chevy Malibu) had been taken apart, piece by piece, and sent to the Texas Department of Public Safety for testing and examination. See Exhibit 79. The results of this painstaking search yielded lots of hair and other physical evidence, but none that was consistent with the notion that the Malibu had been used to transport the victims' bodies to Speegleville Park.

The complete absence of forensic evidence implicating Spence's car in the transportation of the victims required substantial revisions in Melendez' earlier statements. As Melendez explained in his deposition:

> [T]hey didn't like the car because [it] didn't seem logical that you could put three bodies in a car and not find bloodstains or anything from carrying three dead bodies in a car. So what they needed was some other form of transportation.
>
> My truck wasn't even running.[26] But

56.

[26] In fact, the defense presented the testimony of witness Calvin Nesbit at Mr. Spence's Brazos County trial to testify that Gilbert's truck was not operable at the time of the offenses. S.F. Vol. XXI at 5486-5488. By all accounts, Melendez had taken his truck to be repaired by Nesbit and had left it in his yard, id.; the dispute concerned when the car was inoperable. Given that Nesbit was a friend and acquaintance of Melendez's, and not

they suggested that is it possible that I mixed up the times when my truck was not running and that we used my truck. So through their suggestion I entered the truck into whichever first statement the truck appears. That's why these changes were made.

MELENDEZ at 127-128.

Consequently, at Simons' suggestion, Melendez acceded to changes in the statement that would now add an entirely new development: Rather than loading the bodies into Mr. Spence's car -- as at least five prior versions of the statement claimed, see Exhibits 100, 101, 102, 103, and 104 -- Melendez' final version claimed that Spence urged Tony and Gilbert to take the Malibu and drive to Bosqueville, where Gilbert had left his truck, so they could pick up the truck, return to the Park, and then load the bodies into that vehicle. Exhibit 106 at 11. According to this final statement, while Gilbert and Tony went to exchange the Malibu for the truck, Spence supposedly remained alone with the victims' dead bodies in Koehne Park. Id. When the Melendez brothers returned, Gilbert began assisting Spence in loading the bodies into the back of the truck. Id. at 12. The revision in Melendez' statement provides a blatant example of Simons' fabrication[27]:

Spence's, there would be no reason for him to testify falsely to benefit Spence and contradict Melendez. Hence, there are strong reasons to accept that Nesbit's testimony -- and Gilbert's testimony in the District Court proceedings -- was true.

[27] This is only the most notable of the changes that were made in Gilbert's final statements, but there are numerous others. In a bizarre series of revisions, for example, Simons actually transposes Gilbert's and Tony's alleged roles in the

David said, "Ok but we can't leave them here, somebody might have seen us drive through here."	David said, "Ok but we can't leave them here, somebody might have seen us drive through here."
I said, Man, let's just go." He said, "No, I know a place where can take them out at Speegleville, let's put them in the car."	
I said, "Man, I don't want to fuck with it." And started walking off. He said **"Hey, where are you going Bro. You gotta help me load em up."**	I said, "Man, I don't want to fuck with it." And started walking off. He said, **"Hey, where are you going Bro. You gotta get your truck."**
Exhibit 104 at 8.	Exhibit 105 at 11.

See also S.F. Vol. XX at 5255; S.F. Vol. XXI at 5256-5257.

One final problem with Melendez' initial statements was their failure to explain how or when in the course of events the victims were bound and gagged, as their bodies were found in Speegleville Park.[28] As Melendez explained, when the changes

---

version of events. The text in these two statements (Exhibits 104 and 105) is identical for long passages with the sole differences being the name of the person -- Tony or Gilbert -- mentioned in the sentence. For example, in Exhibit 104, the text reads: "**Tony** walked over and knelt down beside the brunette"; at the same place in the account in Exhibit 105, the text reads: "I walked over and knelt down beside the brunette." A little later in each statement: "I told the boy to get up and we walked over by the car where the blonde was" (Exhibit 104); "**Tony** told the boy to get up and walked over by the car where the blonde was" (Exhibit 105). Another: "I was standing approximately two to three feet from the passenger side door" (Exhibit 104); "**Tony** was standing approximately two to three feet from the passenger door" (Exhibit 105) -- and so on. See MELENDEZ 117-125.

As these revisions illustrate, the "facts" for Truman Simons were infinitely malleable, the defendants mere characters in a script.

[28] In fact, on the contrary, Melendez's 1983 statements are replete with references to the victims' "screaming" and "hollering" during the commission of the crime -- wholly inconsistent with the notion that the victims were gagged at that

were made for a revised version, Simons sought to remedy the fact that his earlier statements did not account for the gagging of the victims:

> [T]he suggestion Truman Simons made was there were some things that happened that could not be accounted for [in the first statement]. So ... [t]here had to be a lapse in time somewhere because I couldn't answer the questions he was asking me. So he said if there was a time where I was away from David and David was around the bodies and I wasn't right there with him that it's possible that he could have done some things without my knowledge, something that I didn't know about.... So I said that I was away from David at those times that he was at the bodies. I don't know what he was doing; it looked like this and that and the other. And he said that would give some leeway to other things that happened [...], such as possibly people being tied up and things of that sort.

MELENDEZ at 54.

In other words, a "window of opportunity" had to be inserted into the revised version of Melendez' statement so that facts -- such as the gagging of the victims -- that went unexplained in

---

time. See, e.g., Exhibit 100 at 5 ("she was hollering at him"; "she screamed"); at 7 ("she started to scream and yell at him, cussing at him"); at 8 (Franks arguing with Spence before being stabbed); Exhibit 102 at 2 ("she was hollering at him," "she started to holler"); at 3 ("David started to stab her, she screamed," "she started to scream and yell at him, cussing at him").

Presumably because nobody heard any screams in that part of Koehne Park that night, see infra Section I.B.3, all references to "screaming" or "hollering" in Melendez's earlier statements were deleted from the final version upon which he based his testimony. Compare Exhibit 105. Yet these deletions lead to another contradiction: If the victims were not gagged until after they were killed as Melendez testified, how could their screams not have been heard by any of the numerous people in Koehne Park when the crimes were committed?

the earlier statements could be accounted for. Id. Since Melendez' account of the crimes themselves did not allow for such a "window," it was paradoxically placed after the crimes had been committed, when Melendez claimed that Spence was alone with the bodies of the victims while the Melendez brothers went to retrieve Gilbert's truck. Id. The decision to place this time frame after the murders had occurred, however, led to a flatly implausible chain of events: In his final statement and in his trial testimony, Melendez claimed that the victims were not bound or gagged during the commission of the crimes, but after they had been killed. See Exhibit 105 at 12 ("When we got her to the truck and put her in the back of the truck I saw that her hands were tied behind her back and that she had something tied around her mouth"); see also S.F. Vol. XXI at 5256-57. Common sense, of course, suggests that the victims were bound and gagged at some time during the commission of the crimes; however, Simons' chosen method of working from Melendez' initial false statement had forced him to make patently illogical revisions.

2. Internal inconsistencies in Gilbert and Tony Melendez' trial testimony demonstrates that their testimony was false

Once Truman Simons' process of scripting testimony is exposed, it comes as no surprise that the witnesses had trouble remembering their lines. With respect to basic, elementary facts, the Melendez brothers' testimony is fundamentally inconsistent. A short review of some of the most striking

contradictions reveals that the State presented false testimony against Mr. Spence.

For example, the Melendezes are impossibly inconsistent with each other about how and where in the Park they first encountered the victims. According to Tony, as the three co-defendants first drove into Koehne Park in Spence's car, "another car was coming up from this way":

> We pulled up, and David waved to them at the time, and they stopped and I seen a blond-headed girl and a boy sitting up front.
>
> David stopped and leaned over and was talking to them...
>
> Then they took off, and David said we were going back to the area we just came from where the circle was.

S.F. Vol. XVIII at 4720-21.

According to Gilbert, however, there is no such initial meeting while both parties are in their respective cars; instead, they first see the victims standing near a picnic table in the circle:

> We drove down the road that goes to the circle area until we got to the circle area, [and] I noticed two cars parked there.
>
> There was a larger car and a smaller car parked in that circle area as we came into it.
>
> There was some people standing there. There was some picnic tables around in that area. They were sort of in the center. [...]
>
> [W]e stopped the car, and he called out to her, and when she responded to him, she sort of walked up and started walking toward the car.
>
> [Spence] asked him what was going on. I thought he knew him and the other two people

with him walked up toward the car with her.[29]

S.F. Vol. XX at 5191-92.

These two stories cannot be reconciled. Either (1) the defendants encountered the victims in their car first and then followed them to the Circle, or (2) they drove to the Circle and then saw the victims standing near a picnic table. Both accounts cannot be true.

The accounts of how the crimes unfolded are fundamentally inconsistent as well. According to Tony, after Spence pulled the car off to the side of the road and all of the victims had got out of the car, Spence "pulled out a knife and put it up to the boy's chest," and then "jerked him down to the ground." S.F. Vol. XVII at 4728.

> When the boy was lying on the ground, David came toward me to where I had -- I was standing next to the black-headed girl.
>
> He had a hold of her arm, and David told her he was going to get even with her, and that is when he grabbed a hold of her and started walking off into the wooded area.

---

[29] Indeed, according to Gilbert, it was not until the entire group had decided to leave the Park in Spence's car that he first noticed the victims' car:

> Everybody got in the car and we started the car up to drive off, and there is a turn there...
>
> As we went into the turn to back up, one of the girls said something about, "I hope nobody messes with my car. Nobody -- look out, don't hit my car," as we were backing up.
>
> Then that is when I noticed a smaller car, and thought the smaller car was probably theirs.

S.F. Vol. XX at 5193-94.

Id. at 4729.

In Gilbert's account, the knife-wielding encounter with Ken Franks simply never takes place; instead, the first thing Spence does after getting the others out of the car is order the girls to take their clothes off -- an event that is completely absent from Tony's account. Id. at 5208. According to Gilbert's testimony, when the girls begin to protest, "[t]hat is when I first remembered seeing a knife." Id. at 5209. Eventually, the girls accede to Spence's threats and do remove their clothes, id. at 5210, again a seemingly significant event that is not mentioned at any point in Tony's testimony.

While Tony and Gilbert's accounts of the crimes themselves are inconsistent in countless specifics, one particularly striking contradiction stands out. Both Tony and Gilbert testify that Spence is solely responsible for stabbing each of the victims, with the exception of one of the girls, whom Tony Melendez supposedly stabs as well. The problem, however, is that each co-defendant testified that Tony stabbed a different girl: Tony recounts in detail his stabbing of Jill Montgomery, S.F. Vol. XVIII at 4741-42, while Gilbert unmistakably testifies that Tony stabbed Raylene Rice. S.F. Vol. XX at 5247-48.

This contradiction cannot be attributed to confusion at the crime scene or a lapse in memory; each defendant is specific and unequivocal in his testimony. As Tony Melendez testified about his involvement in the death of Jill Montgomery:

> Then me and David went back over to where the black-headed girl [Jill Montgomery] was

laying, and that is when he told her that he was going to get even with her. [...]

[After he had stabbed her] he handed me the knife. [He] told me that we were all in that together and that we didn't need anybody talking, and I was holding the knife, and he was telling me, "Go ahead, do it." [...] She went to jerk away, and that is when I stabbed her.

S.F. Vol. XVIII at 4741, 4743, 4745.

Yet Gilbert Melendez, testifying about the same event, recounts in no uncertain terms that Tony was involved in the stabbing of the "blond[e] girl," Raylene Rice:

Tony was by the passenger's side door, at that time. So he opened the door and told the **blond[e] girl** [Raylene Rice] to get out of the car, and they got her out of the car. [...]

Spence had the knife like he was trying to push it to Tony. From where I could see them at, Spence had the knife like he was pushing it to Tony saying, "We can't let them go. I killed them two. I have already killed them. We can't let her go. If we don't, she's going to tell." [...]

One of them covered her mouth up because it was muffled, and Tony was hitting her and stabbing with the knife.

S.F. Vol. XX at 5245, 5247, 5248.[30]

As even this abbreviated review illustrates, Tony and Gilbert's testimony was similar in broad outline only. Under any meaningful scrutiny, the illusion that these witnesses testified truthfully about an event in which they both participated

---

[30] Indeed, as this comparison of their testimony indicates, not only is the victim different, but the events leading up to the slaying are different, as well. In Tony's testimony, he simply goes over to where Jill Montgomery is already lying wounded, and proceeds to stab her; in Gilbert's version, Tony and Spence have to remove Raylene Rice from the car, where she implores them not to hurt her.

shatters. The inescapable conclusion is that the Melendezes' testimony was false -- a fact which Truman Simons, the draftsman of their accounts, undoubtedly knew well.

3. Credible, substantiated information contained In the suppressed Waco Police Department reports demonstrates that both Tony and Gilbert Melendez' testimony was materially false

Gilbert and Tony Melendez' accounts of the crimes are not merely internally inconsistent; they are also contradicted by the account of every single civilian witness without exception who was present in Koehne Park on the night of the murders and who came forward in the days following the crimes to report their observations to the police. Indeed, at least a dozen people[31] reported seeing the victims' orange Pinto parked in the "Circle" area on the night of the murders, yet none of them described seeing anyone who looked like David Spence, Gilbert Melendez, or Tony Melendez near the Pinto; none of them saw a gold Chevy Malibu like Spence's or a white Ford truck like Gilbert Melendez' in the Circle area; and none of them heard any screams in the Park. In short, not a single person of these twelve civilians

---

[31] The twelve witnesses are: Ronald Wayne Robinson, Terry Bart Barrett, John Henderson, Kenneth Young, Bonnie Wood, Regayle Bush, Patsy Lyons, Rick Guthrie, David Pearcy, Deanna Storts, Charles Ramsey, and Martha Turner. See Exhibits 3 (Robinson); 7 (Barrett); 8 (Henderson and Young); 10 (Wood and Bush); 13 (Lyons); 18 (Henderson); 19 (Guthrie); 23 (Pearcy); 40 (Storts); 42 (Ramsey); 44 (Ramsey); 45 (Turner). These witnesses were variously in the "Circle" area beginning as early as 4:30 and as late as after midnight, and all except Robinson were in the Park in the mid-evening when the crimes were supposed to be unfolding.

corroborates Tony and Gilbert Melendez' testimony that the crimes took place in the wooded area adjoining the Circle. However, because all of the police reports were suppressed by the prosecution, Mr. Spence's jury was deprived of the cumulative accounts of these witnesses, which would have convincingly demonstrated that his co-defendants' testimony was false.

The reports of these witnesses contradict the Melendezes testimony in two fundamental ways. First, none of these witnesses reported hearing screams in Koehne Park that --even according to Truman Simons -- undoubtedly would have been heard if the murders had in fact taken place there; second, none of these witnesses reported seeing anyone resembling Spence or either of the Melendezes, or a vehicle similar to Spence's gold Chevy Malibu or Gilbert's truck, at any time in Koehne Park.

In his deposition below, Truman Simons provided testimony that undermined his own theory of the crimes as well as the testimony of the Melendezes. Simons asserted that one of the prosecution's witnesses in the McLennan County trial, Charles Ramsey, must have been "mistaken" in his trial testimony that he was present at Koehne Park on the evening of the murders because Ramsey testified that he didn't hear any screams. SIMONS I at 96 ("That old man was wrong on what day he was out there because he should have heard those kids screaming"); see also id. at 115-116. The withheld police reports prove beyond any doubt that Charles Ramsey was in Koehne Park -- indeed, just feet away from the victims' car -- that night. Ramsey, who sat in a distinctive

one-ton white pick-up truck while parked in the "Circle" area from approximately 4:40 until midnight, Exhibit 42; see also Exhibit 44 at 1, was himself observed in the Park by at least half of the other witnesses who similarly reported to the police.[32]

Moreover, like every one of the twelve witnesses, Ramsey saw the orange Pinto in the Circle but heard no screams.[33] Therefore, if, as Simons suggests, witnesses present in the Circle area would have heard screams that night, and twelve witnesses did not do so, one can only conclude that there were no screams in Koehne Park that night, and, therefore, that the murders did not take place there as the Melendezes claimed.

In addition, although all twelve witnesses reported seeing the victims' orange Pinto and the three teens that night, not a single one of them reported seeing anybody who resembled David Spence or the Melendez brothers, or described seeing a vehicle consistent in appearance with either Spence's car or Gilbert

---

[32] The witnesses who reported seeing Ramsey's truck that night were Bonnie Wood, Martha Denise Turner, David Pearcy, Candyce Satterwhite, Rick Guthrie, and Phil Schulze. See Exhibit 10 at 1 (Bonnie Wood); Exhibit 19 at 3 (Candyce Satterwhite and David Pearcy; Rick Guthrie and Phil Schulze); Exhibit 23 at 3 (David Pearcy); Exhibit 45 at 1 (Martha Denise Turner). These witnesses also all observe the orange Pinto at Koehne Park on the night of the murders. None of them report hearing any screams.

[33] The only screams heard on the night of the murders that are documented in the police reports were heard in Speegleville Park. See Exhibit 19 at 3-4 (witness John Evans heard a "terrifying scream" while camping in Speegleville). Given that Speegleville Park was a less trafficked area than Koehne Park -- and given that the bodies were found in Speegleville Park -- this is a far more logical place for the murders to have been carried out.

Melendez' truck. These facts are impossible to reconcile with the Melendez brothers' testimony. For example, according to Tony Melendez, the defendants "followed the Pinto [into the Circle area] ... [and w]e pulled in behind them, right next to them around here," parking directly adjacent to the victims' car. See S.F. Vol. XIX at 4802-03. At that time, the sun was just starting to set. Id. at 4804. The group then got out of their cars and stood in open view, talking and smoking marijuana in the Circle area for "close to two hours." Id.

The suppressed police reports -- containing the witness accounts of more than a dozen civilian witnesses who were in the Circle area of Koehne Park that night -- prove that Tony Melendez' testimony must be false. All twelve of these witnesses observed the victims' orange Pinto in the Circle, yet not a single one reported seeing any of the defendants or their vehicle which, if Melendez' testimony is to be believed, were right next to the orange Pinto for two hours beginning at sunset. The fact that not a single one of these witnesses corroborates Melendez' account supports only one conclusion: that the defendants and their vehicle were not in the Circle area that night, and therefore that the Melendezes' testimony was false.

4. In light of the substantial record developed In the proceedings below, the District Court's failure to address this evidence cannot stand

The District Court's Order fails to address the substantial evidence, adduced during the proceedings below, that demonstrates

that Truman Simons assisted Anthony and Gilbert Melendez in the fabrication of their statements and that the prosecution then knowingly presented their false testimony against Mr. Spence at trial. Although the District Court acknowledged that Mr. Spence alleged in his Petition that the testimony of both Gilbert and Tony Melendez was false and knowingly presented against him, the Court held that "Petitioner fail[ed] to present evidence that would substantiate this claim." Order at 7, 8.

The District Court's assertions simply ignore the fact that Mr. Spence did indeed present evidence with his Petition supporting his allegations that the State not merely knew of and induced false testimony by Tony and Gilbert Melendez, but in fact actively participated in its manufacture. Thus, Mr. Spence presented the affidavit of Waco Police Lieutenant Marvin Horton, who averred that on one occasion, Simons began an interrogation of Gilbert Melendez by telling him, "Gilbert, we're going to turn the recorder off now, and get our story straight, and then we'll turn the recorder back on." See Petition Exhibit L; see also Petition at 20 (pleading facts related to Horton's affidavit and Simons' involvement in the fabrication of statements).

Similarly, with respect to the testimony of Gilbert's brother Anthony, Mr. Spence presented two affidavits supporting his allegations that the testimony of Anthony Melendez was false. See Petition Exhibits G, N; see also Petition at 20-22 (pleading facts related to affidavits and State's knowing inducement, fabrication, and presentation of false testimony by Anthony

Melendez).[34]

More importantly, however, the District Court's Order simply fails to address or take into account any of the substantial evidence adduced during the depositions taken after the District Court's Order which were then subsequently admitted by the District Court and now constitute the record of the proceedings below. Particularly in light of Gilbert Melendez' sworn recantation of his trial testimony and his detailed explanation of how Truman Simons assisted him in the fabrication of his statements and trial testimony, the Court's assertion that "Petitioner fail[ed] to present evidence that would substantiate," Order at 7, is insupportable.[35]

When the State knowingly presents such false testimony, "A new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury.'" Giglio, 405 U.S. at 154; Napue, 360 U.S. at 271; Kirkpatrick v.

---

[34] The District Court admitted into evidence all of the affidavits proffered by Mr. Spence in the proceedings below. See also Transcript of oral argument on Petition for Writ of Habeas Corpus, United States District Court for the Southern District of Texas, January 21, 1994, at 56 (granting Petitioner's motion and admitting affidavits pursuant to Federal Habeas Rule 7); see also Petitioner's Response to Respondent's Objections to Petitioner's Designation of Supplemental Documentary Evidence, and Motion, Pursuant to Federal Habeas Rule 7, To Expand the Record Accordingly.

[35] In summary fashion, the District Court concluded that "it is unlikely that Gilbert completely fabricated the story" in light of the "corroborating testimony of Anthony Melendez, Gilbert Melendez' brother and co-defendant." Order at 5. This assertion, however, overlooks how Tony's testimony, in substantial respects, fails to corroborate his brother's account. See supra section I.B.2.

Whitley, 992 F.2d 491, 497 (5th Cir. 1993) (recognizing that prejudice standard governing knowing presentation of false testimony claims is "considerably less onerous" than Bagley materiality standard regarding suppressed exculpatory evidence, and demands that a conviction "must be set aside if there is any reasonable likelihood that the false testimony could have *affected* the jury's verdict").

In this case, there can be no doubt that Tony and Gilbert Melendez' "false testimony ... could have affected the judgment of the jury." Tony and Gilbert Melendez provided the State's only accounts -- though contradictory -- of how the crimes occurred; without their testimony, Mr. Spence's jury plainly did not have sufficient evidence upon which to base a conviction. Because Tony and Gilbert Melendez' false testimony could have affected and did affect the judgment of the jury, and because the District Court plainly erred in its conclusion that Mr. Spence "fail[ed] to present evidence that would substantiate this claim," this Court should grant a certificate of probable cause to review Mr. Spence's substantial allegations that false testimony was knowingly presented against him.

II. THE DISTRICT COURT FAILED TO ADDRESS EVIDENCE THAT THE STATE KNOWINGLY PRESENTED THE FALSE TESTIMONY OF INMATE WITNESS DAVID PURYEAR; THAT THE STATE FAILED TO DISCLOSE PRIOR INCONSISTENT STATEMENTS BY PURYEAR THAT WOULD HAVE DEMONSTRATED PURYEAR'S TESTIMONY WAS FALSE; AND THAT THE STATE CONCEALED THE PROMISES IT MADE TO PURYEAR TO INDUCE HIS FALSE TESTIMONY

In contrast to the prosecution's heavy reliance on inmate

testimony at Mr. Spence's McLennan County a year earlier, the prosecution recalled only a single inmate witness -- David Puryear -- to testify against Mr. Spence at his Brazos County trial. As the evidence in the proceedings below demonstrated, Puryear's testimony in both trials was perjured and the State concealed evidence that would have demonstrated its falsity.

The primary significance of David Puryear's trial testimony concerned a bandana he drew for Spence while the two of them were incarcerated in the McLennan County Jail. Puryear testified that Spence asked him to draw the images of two girls, one blonde and the other brunette, on a bandana which Puryear had made for Spence; the State introduced this testimony as an implicit admission of guilt by Spence in the crimes. S.F. Vol. VI at 952.

As demonstrated by the evidence in the proceedings below, Puryear's testimony about how the drawings and inscriptions came to appear on the bandana was false. In support of his allegations, Mr. Spence introduced the sworn affidavit of Steve Moore, Puryear's brother-in-law at the time, who averred that Puryear confided to him "several times that he'd made most of his testimony up." Exhibit 89.[36] Specifically, Moore recalled that Puryear told him that he had lied about Spence asking him to draw the images of the two girls on the bandana; instead, Puryear said "that he drew all those things on the bandana first and then just asked Spence if he wanted to have it. Spence never asked him to

[36] According to Moore, Puryear said he "made up" this testimony in exchange for promises of monetary payment and a promise to cut short his time in custody. See Exhibit 89.

draw anything on the bandana." Id.

In addition, Mr. Spence also presented notes from the State's investigation -- concealed from Spence by the State -- which reveal that when Puryear first spoke to state investigators he told them that it was his idea -- not Spence's -- to draw the girls on the bandana and that the "only thing DS [David Spence] asked to put on [the] scarf was [the words] 'Texas Outlaw.'" See Exhibit 93. Thus, only after additional meetings with state agents did Puryear reverse these facts to create the account to which he testified.

Although the District Court observed in its Order with respect to Mr. Spence's McLennan County trial that "this inconsistency may demonstrate that Puryear was not entirely truthful when he testified," Order [92-117] at 10, the Court inexplicably failed to address precisely these same allegations when they were raised in the instant case. Because Mr. Spence presented the same evidence undermining Puryear's testimony in this case as he did in the habeas proceeding concerning his McLennan County conviction, and because Puryear's testimony was materially identical to his testimony in the earlier trial, the same conclusion regarding Puryear's testimony is compelled. This Court should grant a certificate of probable cause to correct the District Court's error, and assess the cumulative prejudice of the State's presentation of Puryear's false testimony together with Mr. Spence's other claims of state misconduct.

III. THE STATE FAILED TO REVEAL SUBSTANTIAL, CREDIBLE EVIDENCE THAT PERSONS OTHER THAN SPENCE WERE RESPONSIBLE FOR THE MURDERS, IN VIOLATION OF <u>BRADY V. MARYLAND</u>

Prior to David Spence's capital murder trials, defense counsel repeatedly requested that the State provide the defense with access to critical information, including exculpatory and impeachment evidence, in the State's possession.[37] Despite these persistent, specific requests, substantial exculpatory information, including numerous police reports and other documents at issue in this case, was never disclosed to the defense. The undisclosed police reports, for example, are replete with exculpatory factual information that contradicted the theory of the case presented by the State and indicated that persons other than Mr. Spence were responsible for the crimes. Nevertheless, it is undisputed that none of the relevant police reports or other documents were ever turned over to Mr. Spence.

As Mr. Spence has set forth at length previously, the State was in possession of substantial, credible evidence that persons

---

[37] For a review of the discovery motions filed in this case, <u>see</u> Motion for Evidence Favorable to the Defendant, Tr. at 14; Motion for Discovery, Production and Inspection of Evidence No. 1, Tr. at 28; Memorandum in Support of Motion for Disclosure of Impeaching Evidence, Tr. at 42; Motion for Discovery, Production and Inspection of Evidence No. 2, Tr. at 135; Motion for Discovery, Production and Inspection of Evidence No. 3, Tr. at 178; Motion for State to Supplement Discovery, Tr. at 181; Motion to Compel No. 1, Tr. at 238; Motion to Compel No. 2, Tr. at 175; Motion to Compel No. 3, Tr. at 172; Motion for Production, Tr. at 167; Motion for Discovery, Tr. at 265.

The rulings on each of these motions were made by the trial court during pretrial proceedings prior to Mr. Spence's McLennan County trial, but applied to all three capital cases against Mr. Spence. <u>See</u> Exhibit 144, at 6-9; REAVES at 8-10.

other than Spence and his co-defendants were responsible for the crimes. See Post-Hearing Brief at 11-63. For the sake of brevity and to avoid redundancy, Mr. Spence adopts herein by reference the factual exposition of the alleged exculpatory evidence that he has set forth in prior pleadings. Id.; see also Memorandum in Support of Petitioner's Application for Certificate of Probable Cause to Appeal [No. 94-20213] at 57-71. For purposes of this Memorandum, he turns to the District Court's erroneous disposition of this claim in light of the facts of this case.

A. The District Court's Order Fails To Address Substantial Evidence Alleged To Be Exculpatory By Mr. Spence

As a preliminary matter, the District Court's Order simply fails to address a great deal of the evidence to which Mr. Spence has alleged he was constitutionally entitled. Because the District Court's failure to take into account all of the alleged exculpatory evidence, the Court's ultimate conclusions about the materiality of the evidence suppressed by the State are necessarily deficient.

Thus, with respect to suspect Terry "Tab" Harper, the Court only considered the question of the admissibility of Harper's inculpatory statements, yet failed to address the admissibility of all of the other substantial evidence that implicated Harper in the murders. This evidence included eyewitness witness reports confirming Harper's presence in Koehne Park on the night of the murders and evidence that, while victim Kenneth Franks was

deeply in debt over drugs and had been physically threatened if he did not satisfy his debts, Harper was a known drug associate -- and possibly a drug dealer -- of Franks'. See Post-Hearing Brief at 36-41.

Similarly, the District Court failed to address all of the numerous instances in which Harper made incriminating statements about the murders, apparently recognizing only one occasion in which Harper "bragged to a witness that he killed two women and a man." Order at 3. Indeed, even this characterization of Harper's encounter with witnesses Nell Priest and June Wilson fails to acknowledge that Harper made these incriminating statements to Priest and Wilson before the bodies of the victims had been found and included details of the crime that were not publicly known until months later. See SALINAS at 66.

In addition, the District Court's Order also fails to address additional exculpatory evidence that contradicts Tony and Gilbert Melendez' accounts of the crimes. For example, among the suppressed police reports were the names of more than a dozen civilians who had been in the Circle area of Koehne Park where the victims were allegedly abducted and killed, not one of whom observed any of the co-defendants or their vehicles in the area that night, nor reported hearing any screams that necessarily would have been heard as the victims were killed nearby. See Post-Hearing Brief at 107-11; see also SIMONS I at 115-116 (screams of victims would have been heard by anybody in the Circle at the time). At the same time, the prosecution also

suppressed the fact that the only reported screams that were heard that night were in Speegleville Park -- a fact that is consistent with Mr. Spence's theory that the crimes were most likely committed by someone with access to a boat (since the victims' car was left abandoned on the opposite side of the lake, at Koehne Park), which in turn dovetails with evidence that Harper did so. See Exhibit 10 at 3-5 (police report documenting observation of Harper in a boat on Lake Waco on day after the murders).

Because the District Court's Order failed to take all of this exculpatory evidence into account, the Court's conclusion that the State's suppression of evidence was not material to Mr. Spence's conviction is undermined.

B. The District Court's Conclusion That Some Of The Alleged Exculpatory Evidence Was Not Material For Purposes Of A Brady Claim Evinced A Misapprehension Of Both Federal And State Law

For reasons that have been discussed at greater length elsewhere, the District Court's Order is fundamentally flawed in that it relies on erroneous understandings of both federal constitutional and state evidentiary law. See Motion to Alter or Amend Judgment [H-91-3718] at 18-40; Memorandum in Support of Petitioner's Application for Certificate of Probable Cause [94-20212] at 72-84.[38] Because the Court's conclusion about the lack

[38] The District Court's legal analysis of Mr. Spence's Brady claims in this case was substantially identical to its analysis in the companion case arising out of Spence's McLennan County conviction. Compare Order [H-91-3718], dated April 30, 1992, at

of materiality of the suppressed evidence was premised on these erroneous understandings, a certificate of probable cause should issue.

As Mr. Spence has previously noted, the District Court is in error in its preliminary assumption that the State's obligations under Brady extend only to evidence that was itself admissible at trial. In fact, as this Court made clear in Sellers v. Estelle, 651 F.2d 1074 (5th Cir. 1981), cert. denied, 455 U.S. 927 (1982), evidence suppressed by the State may be "material" for purposes of Brady analysis if disclosure of the information would have led to other admissible evidence or testimony, or if the evidence "was material to the preparation of petitioner's defense, regardless of whether it was intended to be admitted into evidence or not." Sellers, 651 F.2d at 1077, n.6. In this case, as lead counsel Walter Reaves affirmed in an affidavit attached to the Petition, defense counsel's strategy would have affected the preparation of the defense:

> Our defense strategy during the guilt/ innocence phase of Mr. Spence's trial was to demonstrate that the State could not prove beyond a reasonable doubt that Mr. Spence committed the crime. Essentially, we sought to convince the jury that Mr. Spence had an alibi and that the State's "version of the crime was not credible. One thing we tried to do was show that there were other suspects who could have committed the crime. Access to evidence pointing to other suspects was critical to our defense of Mr. Spence.

2-6 with Order [H-92-117], dated April 30, 1992, at 2-5. Consequently, Mr. Spence's arguments concerning the District Court's disposition in his sister appeal, Spence v. Scott, No. 94-20213 (5th Cir. 1994), largely apply to the instant case.

> Significant information contained in the State documents itemized above exculpates David Spence and tends to link other suspects to this crime. Additional information contained in the State files could have been used to substantially impeach State trial witnesses. Our defense of Mr. Spence would have been different -- and undoubtedly improved -- if the State had disclosed the documents listed above to us.

Petition Exhibit O at 4; see also REAVES at 12-17 (disclosure of the suppressed reports "would have had a significant impact on the outcome of the trial and it would have had a significant impact on our preparation and our strategy and our investigation").

With respect to specific species of the alleged exculpatory evidence, the District Court repeatedly applied erroneous state law evidentiary standards. Thus concerning the substantial evidence implicating the victims -- particularly Kenneth Franks -- in both drug use and drug trafficking that Mr. Spence has alleged was relevant to linking Terry Harper to the murders in this case, see Post-Hearing Brief at 38-42; Petitioner's Reply Brief at 25-29, the District Court erroneously evaluated the admissibility of this evidence under Texas evidentiary rules regarding "character evidence." Order at 3. Technically speaking, of course, in the context of the facts of this case, the evidence of the victims' drug dealing was not "character" evidence at all (i.e., it was not relevant to show the character of the victims or their proclivity to engage in certain conduct); rather, it was substantive evidence of a defensive theory of the offense that explained the victims' presence at the scene of the

crime, their association with certain known suspects, and these suspects' motives for committing the crime. Thus the District Court erred in evaluating the evidence under this evidentiary standard.

However, even under the state law standard governing the admission of character evidence, Mr. Spence has demonstrated the admissibility of this evidence. Thus, as the District Court correctly noted, evidence of the victim's character is admissible if "the evidence is pertinent to the charged crime." Id. (citing TEX.R.EVID. 404). Contrary to the Court's conclusion, however, Mr. Spence alleged and has since demonstrated that the decedents' involvement with drugs was relevant to a defense theory implicating Tab Harper in the murders. See, e.g., Petition at 5 (suppressed evidence of drug dealing links Kenneth Franks to Harper, "whom Gayle Kelley told police she suspected could have been Franks' new 'supplier'"); at 12-16 (setting forth additional suppressed evidence corroborating theory that "Ken Franks was killed over a drug transaction (and that Jill and Raylene were slain to prevent their identifying Franks' killers"); see also Post-Hearing Brief at Post-Hearing Brief at 38-42; Reply Brief at 25-29. Because the District Court's conditioned its conclusion that this suppressed evidence lacked materiality on the erroneous premise that Mr. Spence had failed to show that the "character evidence was pertinent or that it would have been admissible," the District Court's disposition of this claim must be reversed.

With respect to the evidence implicating Terry Harper in the

murders, the District Court misapplies Texas evidentiary law. Thus, the Court erroneously asserted that "a defendant can present the jury with other suspects if ... the third party is a witness for the State." Order at 4 (citations omitted). Applying this test to the suppressed evidence implicating Tab Harper, the District Court held that while "Harper's statements appear inconsistent with defendant's guilt, and his presence in the park that night seems to indicate that he committed the murder[,] Harper, however, did not testify for the State, and therefore his statements would not be admissible." Id. Contrary to the District Court's test, however, the Court of Criminal Appeals held on direct appeal in this case that a defendant may introduce evidence that a third person may have had a motive to commit the crime with which the accused is charged "if the accused can link the third person to the offense." Spence v. State, 795 S.W.2d 743, 755 (Tex. Crim. App. 1990). The Court quoted Porch v. State, 50 Tex.Cr.R. 335 (Tex. Crim. App. 1906), as follows:

> Some testimony must be offered showing opportunity on the part of such third person and testimony tending to show that such party may have committed the offense.

Id.

As the District Court's Order makes clear, the suppressed evidence implicating Harper in the crimes satisfies this test. Thus the Court noted Harper's "presence in the park that night seems to indicate that he could have committed the murder," Order at 4, thereby acknowledging that Harper had the necessary

"opportunity" to commit the offense. As for evidence "tending to show that [Harper] may have committed the offense," the suppressed police documents also contained reports that Harper had pledged to commit a violent crime, and had solicited the assistance of another person in carrying one out, shortly before the murders occurred; reports that he had boasted of his responsibility for the murders on at least three separate occasions afterwards, including details about the crimes in his statements that was not then public knowledge; and, finally, reports that victim Kenneth Franks was deeply in debt over drugs, and that Harper was a known drug associate -- and possibly a dealer -- of Franks'. Together with the substantial evidence demonstrating the victims' involvement in drug dealing, the amount of cash that they took to Koehne Park that night, and the fact that they were killed in a location well known for drug purchases[39], it can hardly be denied that the cumulative force of this evidence amounts to a powerful case against Harper in the murders.

Finally, the District Court's Order repeatedly applies an erroneous statement of the Bagley materiality standard governing Mr. Spence's Brady claim in finding that Mr. Spence failed to

---

[39] Several officers testified that Koehne Park was well known as a location where teenagers would go to buy and sell drugs. See, e.g., SALINAS at 139. Moreover, it was determined that Jill Montgomery cashed a $200 check in Waxahachie before leaving for Waco, see Exhibit 6 at 6, picked up another payroll check in Waco and cashed that as well, Exhibit 51 at 1 -- though she had a credit card to cover gas and other expenses for the short trip. Exhibit 2 at 3.

show that the "result of his trial would have been different" if the defense had been provided with the undisclosed evidence. Order at 5. Contrary to the District Court's Order, however, Mr. Spence need not prove that "the result of his trial would have been different"; rather, he must only prove that there is a "a reasonable probability that the result of the proceeding would be different." United States v. Bagley, 473 U.S. 667, 683 (1985) (emphasis added).[40] Such a "probability" is one "sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 677.[41] Because Bagley imposes a standard less onerous than that to which the District Court evaluated Mr. Spence's claim, a certificate of probable cause must issue to correct the District Court's error.

C. Application Of The Correct Standard Of Materiality Requires Relief

Applying the correct standard of prejudice, there can be no doubt that it is "reasonably probable" that "the result of the

---

[40] A "reasonable probability," as the Supreme Court has defined it, "is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 677. Certainly to undermine or diminish confidence in the outcome is not synonymous with conclusively demonstrating that "the result of his trial would have been different," as the District Court demanded.

[41] With respect to the quantum of proof necessary to undermine a reviewing court's confidence, this Court has emphasized that "a defendant need not show that [the constitutional violation) more likely than not altered the outcome of the case." Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985)(emphasis in original). That is, a habeas petitioner need not prove that the outcome of the trial would have been different by a "preponderance of the evidence." Id. at 1180; see also Bouchillon v. Collins, 907 F.2d 589, 595 (5th Cir. 1990) (the appropriate standard involves a lower burden of proof thatn the preponderance standard").

proceeding would have been different" had the State disclosed the suppressed evidence. Had the undisclosed exculpatory evidence been revealed to the defense, Mr. Spence would have been able to mount an effective defense of innocence, presenting testimony and significant evidence that affirmatively inculpated another person as responsible for the murders, while at the same time demonstrating that Gilbert and Tony Melendez' account of the crimes was false and inconsistent with every other civilian witness' observations on the night of the crimes.

Further, in assessing the materiality of the suppressed evidence, this Court must consider how the State's compliance with its constitutional obligations to turn over exculpatory evidence would have deprived the prosecution of the central evidence it presented against Mr. Spence in this case: the testimony of Gilbert and Tony Melendez. Because the suppressed evidence was exculpatory to the Melendez brothers as well as Mr. Spence, the State likewise violated its duty to turn over this evidence to them. As both co-defendants have attested in the proceedings below, had the suppressed police reports been made known to them at the time of their pleas, they would have rejected the State's plea offers and asserted their rights to trial. See MELENDEZ at 101-02; Exhibit 119 (affidavit of Tony Melendez). Consequently, neither co-defendant would have been available to the State to testify against Mr. Spence in this case. Indeed, to ignore the way in which the prosecution's case would have been weakened by the disclosure of the exculpatory

evidence is to grant the State a windfall for its misconduct. The principles underlying Brady could not countenance such a result; a certificate of probable cause must issue.

IV. THE DISTRICT COURT FAILED TO ADDRESS WHETHER THE ADMISSION OF THE TESTIMONY OF FORENSIC ODONTOLOGIST DR. HOMER CAMPBELL VIOLATED MR. SPENCE'S FEDERAL CONSTITUTIONAL RIGHTS.

In addition to the testimony of Gilbert and Tony Melendez, the State's case at the guilt phase rested heavily upon the testimony of forensic odontologist Dr. Homer Campbell. Dr. Campbell testified that he could identify alleged "bite marks" on the bodies of the deceased as having been made by the teeth of David Spence. Dr. Campbell, however, never examined or tested the allegedly bitten skin; he drew his conclusions entirely from studying photographs of the body and plaster models of Mr. Spence's teeth. Despite this shaky foundation, Dr. Campbell assured the jury that his opinion linking Mr. Spence to the alleged "bite marks" was offered "to a medical and dental certainty."

While the field of forensic odontology qua science may be sufficiently established to justify the admission of such testimony in a non-capital case, on the particular facts of this trial the admission of Dr. Campbell's unreliable testimony violated the Eighth and Fourteenth Amendments' requirement of "heightened reliablity" in capital cases. See Johnson v. Mississippi, 486 U.S. 578 (1988); Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976).

A. The Development Of The Odontological Evidence And The Unreliability Of The Specific Methodology Employed To Document And Identify Them In This Case Rendered Dr. Homer Campbell's Testimony Unconstitutionally Unreliable

1. The series of events leading to the "discovery" of the "bite marks" in this case casts doubt on the reliability of any testimony purporting to make an identification based upon them

As a preliminary matter, the series of events that led to the "discovery" of the bite marks in this case casts considerable doubt over the reliability of any testimony purporting to make any identification from them. Thus when medical examiner M.G.F. Gilliland conducted autopsies on the bodies just days after they were found, she failed to identify any wounds on the bodies consistent with "bite marks." See S.F. Vol. XVII at 4626-4628. According to Waco Police Lt. Marvin Horton, during a post-autopsy meeting with Gilliland, he specifically asked her whether any of the wounds on either of the girls could have been caused by biting and Gilliland emphatically rejected the suggestion that they were. See HORTON at 12-13.

Nearly a year later, however, assistant prosecutor Ned Butler thought he saw bite marks on the bodies of the victims in the autopsy photographs -- photos, in other words, from the same autopsy Gilliland had conducted and had concluded, after examining the bodies themselves firsthand, that there were no such bite marks.[42] SCOTT at 61-63; S.F. Vol. XVII at 4633.

---

[42] As it turned out, Butler had been an assistant prosecutor in Amarillo before coming to McLennan County, and had used forensic odontologist Homer Campbell as an expert witness in

Because Dr. Gilliland did not recognize these wounds as bite marks, however, no effort had been made to photograph the wounds in the manner necessary to document them for purposes of identification. Thus the photographs failed to include a scale from which measurements could be made and had not been taken at the necessary 90° angle at which the wounds would be accurately shown without distortion.

Thus, before Dr. Campbell reviewed the photographs for purposes of identification, he first had them "enhanced" by a "photogrammetrist," Dr. James Ebert, and then the State obtained a warrant to require David Spence to provide a bite mark examplar. Once impressions of Spence's teeth had been taken, Campbell compared them with the enhanced photographs.[43]

---

previous capital murder prosecutions in Amarillo. See BUTLER at 8-9. The credibility of Dr. Campbell, however, is questionable at best. As Waco Police Lt. Marvin Horton testified, Campbell was reputed to be a "friendly" witness to the State who always testified favorably for the prosecution. HORTON at 29, 37-38.

[43] Once the State decided to cast these wounds as "bite marks," it obtained the bite impressions from one and only one person, David Spence. Indeed, not even his co-defendants, Gilbert and Tony Melendez, were initially compared as possible sources of the supposed bite marks. It was not until the defense made an issue at Mr. Spence's second trial of the State's bad faith in only attempting to compare the marks with Spence that the State went through the charade of making "comparisons" with the samples of other suspects -- to precisely the same "expert" (Homer Campbell) who had already testified twice against Spence. See S.F. Vol. XXI at 5546-5552 (State did not obtain impressions of Tony and Gilbert Melendez's teeth until after Campbell testified in prosecution's case-in-chief at Mr. Spence's second trial). Indeed, no witness -- including the State's expert, Campbell -- has ever testified in any proceeding regarding comparisons of the alleged bite marks with exemplars of any suspect's teeth other than David Spence's. Thus the history of the development of this "evidence" provides yet another example of the prosecution's practice of singling out the "guilty" party

At trial, Campbell testified that he was able to conclude, to a "reasonable degree of medical and dental certainty," that the marks on the girls bodies were caused, to the exclusion of any other person, by David Spence. S.F. Vol. XX at 5042. In response, the defense presented the expert testimony of Dr. Gerald Vale, who testified that utilizing the "scoring system" endorsed by the American Board of Forensic Odontology for bite mark comparisons and identification, a "generous" scoring of the evidence in this case did not come within the minimum range in which to "permit any kind of a reliable conclusion." Id. at 5139-48.[44]

In short, the discovery of "bite marks" on the bodies of the victims did take place until well after Truman Simons had already focused on Spence as his culprit and was desperately in need of physical evidence to link Spence to the murders or to corroborate Gilbert Melendez' unreliable statements. See Exhibits 78, 79, 80 (physical evidence at scene does not match Spence or co-defendants); see also MELENDEZ at 55-56; Exhibit 108, document #36 [or Tressa Granger No. 39]. Given the circumstances in which the bite marks were belatedly discovered, as well as the facility with which Campbell confidently opined that the dubious marks

---

first and then "working backwards" to build the case against that person.

[44] Campbell, on the other hand, eschewed this objective scoring system, relying instead on a visual evaluation of the similarities between the marks and the known impressions. Thus, unlike the attempt to evaluate the evidence according to objective standards, Campbell's admittedly subjective "eyeball" method was not subject to review by other experts.

were made by Spence's teeth (particularly, when they hadn't even been identified as bite marks in the first place), strongly casts doubt on the fundamental integrity of this evidence.

2. The District Court's Order overlooked evidence that Mr. Spence presented with his Petition in support of his claim that Homer Campbell's testimony was unconstitutionally unreliable

In rejecting Mr. Spence's claim that the admission of Homer Campbell's testimony violated his due process rights to a capital trial and sentencing proceeding free from unconstitutionally unreliable evidence, the District Court erroneously asserted that Mr. Spence "provides no support for his conclusory allegation." Order at 13. In reaching this conclusion, however, the Court inexplicably overlooked detailed evidence that Mr. Spence did present in support of his claim, which, as the following review of the evidence makes plain, was far from "conclusory."

First, in support of this claim, Mr. Spence presented a report written by Dr. Thomas Krauss, D.D.S., attached to the Petition as Exhibit H, which analyzed Campbell's methodology in this case and found it to be, in significant respects, "well outside the mainstream of thinking in the practice of forensic odontology." See Exhibit 127 at 4 (originally filed as Petition Exhibit H). For example, Dr. Krauss identified the following specific deficiencies with the methodology Campbell employed in this case:

(1) The "photographic enhancements" which form the basis of Campbell's analysis are rife with potential inaccuracy. See Exhibit 127 at 2-3. According to Dr. Krauss, it is

impossible to determine, for example, that "out-of-plane perspective distortion," the distortion caused by differing distances between the camera lens and the relevant scale on the one hand, and between the camera lens and the photographic "object" (here, the alleged bite mark) on the other, did not fatally impair the accuracy of the photographs upon which Campbell relied. Id. Furthermore, Krauss noted, the testimony of James Ebert, Ph.D., who prepared the photographic enhancements, "[does] not appear to be based on accepted photogrammatic principles" which might have corrected for such distortion. Id. According to Krauss, even a small error of this sort could be critically important; an opinion based on a faulty scaling "could be totally inaccurate." Id.

(2) The technology employed by Ebert and Campbell has been identified as fraught with inaccuracy. Krauss noted that Ebert created the enhancements using a Digicol Image Processor (DIP), which has been described by experts in the field of scientific imaging, according to Krauss, as wholly "inadequate in this application," (that is, in producing enhancements for bite mark identification), and very possibly producing "false or misleading results." Id. at 4. This distorting effect is an unalterable consequence of the machine's design, and occurs because the DIP "enhances vertical edges only, leaving horizontal edges unenhanced." Id.

(3) Finally, the unreliability of Campbell's conclusions is a function of his refusal to employ any overlay procedures in making comparisons and reaching his opinion. Id. According to Krauss' report, the use of transparent overlays is "commonly accepted in the relevant scientific community" as enhancing the reliability of an identification made with three-dimensional models, and Campbell's refusal to use them is "well outside the mainstream ... in the practice of forensic odontology." Id. Campbell's analysis and conclusions are thus doubly compromised, and cannot satisfy the constitutionally required standard of "heightened reliability " in capital cases.

Exhibit 127 (Petition Exhibit H). Given this detailed critique of the methodology Campbell employed in this case, Mr. Spence's challenge to its reliability cannot fairly be dismissed as merely "conclusory."

In addition to offering Dr. Krauss' report in support of his

claim, Mr. Spence also presented evidence with his Petition that Homer Campbell had previously misidentified -- on the basis of teeth comparisons -- the remains of a dead woman as those of a missing runaway who subsequently turned up alive. See Petition at 155-156; see also Petition Exhibit M and (Comprehensive) Exhibit 126[45]. As Mr. Spence argued below, the fact that Campbell's methods resulted in such a demonstrably egregious error strongly supports his allegations that Campbell's methodology is too fundamentally flawed, and his credibility too suspect, for his opinion to form the basis for a capital murder conviction.

Because the District Court overlooked the evidence Mr. Spence presented with his Petition in support of this claim, the Court's disposition of this claim was in error. Consequently, a certificate of probable cause to appeal must issue.

3. The District Court erred in excluding the proffered reports of five expert forensic odontologists who studied the odontology evidence as part of a "blind panel" study and who unanimously concluded that Dr. Campbell's testimony was fundamentally unreliable, and further erred in denying Mr. Spence an evidentiary hearing in which he could have presented this evidence

Although Mr. Spence presented the report of Dr. Krauss and the documentation of Campbell's prior misidentification in support of his claim when the Petition was filed, Mr. Spence also

---

[45] N.B. One of the articles submitted as part of Petition Exhibit M was inadvertently omitted from Comprehensive Exhibit 126 when it was compiled.

noted in his Petition that he "continue[d] to investigate and develop this claim," and that he proposed to follow Dr. Krauss' recommendations for further study of the prosecution's dental evidence to demonstrate that the conclusions obtained by Campbell were so unreliable as to be constitutionally unacceptable. Petition at 152 n.41. Specifically, Dr. Krauss had proposed in his initial report that Mr. Spence set up a "blind panel" of five certified odontologists, "each with suitable bite mark experience and completely unfamiliar with this case," to review the State's bite mark evidence and then to independently report their findings. In an effort to present the most objective evaluation of the bite mark evidence possible, Mr. Spence undertook this ambitious project while the Petition was pending below.

Thus, consistent with the recommendations of Dr. Krauss, Mr. Spence set up a "blind panel" composed of five expert forensic odontologists to review the same evidence upon which Dr. Campbell had based his identification of Mr. Spence. The five expert panelists were chosen by Dr. Krauss[46], who handled all correspondence with each of the panelists to ensure that they had no contact with counsel for Mr. Spence. To further ensure the scientific credibility of the panelists' analyses, Dr. Krauss did

---

[46] The panelists were Drs. Jeffrey Burkes, Peter F. Hampl, John P. Kenney, Harry H. Mincer, and Richard Souviron. Their respective curriculum vitae were attached together with their reports, and proffered to the District Court at oral argument on January 21, 1994. See "Forensic Odontology in David Wayne Spence Case," proffered exhibit at oral argument on January 21, 1994, in the United States District Court for the Southern District of Texas.

not inform the experts that the bite marks were related to a legal case, did not provide them with any details or facts of the case, and did not advise them whether a positive or negative identification of the evidence had ever previously been made.

Dr. Krauss' study was designed to proceed in two "phases." In the first phase, the experts were to review the evidence used by Dr. Campbell to (1) identify any bite marks they saw; (2) determine what information the bite contains about the biter's teeth; and (3) diagram, if possible, the biter's tooth configuration. Each panelist was then required to independently provide a report at the conclusion of the first phase. In the second phase, the panelists were provided with a "dental line up" of five sets of similar dental models, including the model of Mr. Spence's teeth that was used by Dr. Campbell. Each examiner was then asked if the perpetrator of the marks could be identified from among the dental models and, if so, the degree of confidence that the examiner had in his identification. At the conclusion of the second phase, the panelist was again required to provide a report documenting his findings.

The results of the panel's conclusions were unanimous in that no reliable identifications from the evidence could be made. Indeed, after phase one of the study was completed, one of the panelists -- Dr. Peter Hampl -- asserted that the "possible bite mark patterns" were of such poor quality that reliable bite mark analysis was "impossible," and as a result declined to participate in the phase two analysis of the evidence. The

remaining four panelists who continued through the second phase of the project unanimously failed to identify the model of Mr. Spence's teeth (known only to the panelists as "#2") as the source of the bite mark. In fact, while all four of these experts claimed that none of the dental models could be matched to the bite marks with any degree of scientific certainty, two of the experts stated that they could not rule out dental model #5 -- a cast of teeth from one of Dr. Krauss' dental patients! -- as the source of the bite marks in this case.[47]

While Mr. Spence offered the reports of these experts into evidence in support of this claim, the District Court rejected Mr. Spence's attempt to admit the results of this study into evidence.[48] As a result, by refusing to conduct an evidentiary

---

[47] Of the other two experts, Dr. Richard Souviron, concluded that the marks depicted in the photographs were "not identifiable enough to state to a reasonable certainty" that they were bite marks, while Dr. Harry Mincer was unable to match the marks with "any degree of scientific certainty" to any of the dental models. See "Forensic Odontology in David Wayne Spence Case," proffered exhibit at January 21, 1994, oral argument (report of Dr. Thomas C. Krauss, dated January 20, 1994, summarizing findings of the five experts).

[48] Instead, the Court allowed Mr. Spence to place a copy of the proffered exhibit into the District Court record as part of a bill of exceptions, "to show that it was not admitted into evidence." See Transcript of Oral Argument, January 21, 1994, at 4. The reason the District Court rejected Mr. Spence's admission of the exhibit into evidence was because the State argued that it should have been filed in conjunction with deadlines for submission of documentary evidence that had been agreed between the parties. Id. These deadlines, however, related to the submission of documentary evidence in support of Mr. Spence's Brady claims -- the only claims upon which the District Court had granted Mr. Spence the opportunity to further develop the evidentiary record. See Order, CA No. H-91-3718, entered September 23, 1992, at 1-2.

hearing on this claim and then denying admission of Mr. Spence's proffered evidence, the District Court prevented Mr. Spence from introducing compelling evidence that severely calls into question the reliability of the odontology evidence admitted against Mr. Spence and the integrity of the process of its development. On this record, the District Court's assertion that Mr. Spence failed to present evidence in support of his claim is unwarranted; rather, the Court itself foreclosed Mr. Spence from doing so. The District Court's failure to take account of this persuasive evidence in its resolution of this claim demands that a certificate of probable cause issue.

V. THE DISTRICT COURT ERRED IN FAILING TO CONSIDER MR. SPENCE'S CLAIM THAT THE CUMULATIVE EFFECT OF REPEATED AND CONTINUING PROSECUTORIAL MISCONDUCT DENIED HIM A FUNDAMENTALLY FAIR TRIAL.

In his Petition for Writ of Habeas Corpus, Mr. Spence alleged that the aggregate effect of repeated and continuing misconduct by the prosecutors in his case denied him due process of law. Petition for Writ of Habeas Corpus at 135-140.[49] In resolving such a challenge, Fifth Circuit precedent requires that a reviewing court determine whether a defendant has been "denied fourteenth amendment due process by the cumulative effect of errors committed in a state trial, which together deny fundamental fairness." Derden v. McNeel, 978 F.2d 1453, 1456

[49] "The cumulative effect of the prosecutors' multifarious violations of rights guaranteed by the federal Constitution was to deny him a fundamentally fair trial." Petition at 135.

(5th Cir. 1992) (en banc), cert. denied, ___U.S.___, 61 U.S.L.W. 3684 (1993) (emphasis added).[50] Although the court below expressly recognized that Mr. Spence alleged that the "cumulative effect of [the State's] misconduct led to a denial of his right to a fair trial," Order at 27, the court proceeded to consider each of Mr. Spence's allegations *seriatim*, rather than assessing the aggregate prejudice from these errors as required by Derden. The district court's failure to employ the correct legal standard in reviewing Mr. Spence's claim of cumulative error warrants a grant of probable cause to appeal. As demonstrated infra, the actions of the prosecutors in Mr. Spence's trial, considered as a whole, reveal a campaign of pervasive unfairness.

First and foremost, the prosecutors in Mr. Spence's case engaged in the intentional and wholesale misrepresentation of material facts to the jury at both phases of trial. As Mr. Spence has convincingly demonstrated, the prosecutors concealed material exculpatory evidence that law enforcement officers uncovered in their investigation of the murders. Had this evidence been disclosed to the defense, as required by Brady v. Maryland, 373 U.S. 83 (1963), the trial doubtless would have ended in Mr. Spence's acquittal. The prosecution also chose to

---

[50] Compare Ex Parte Brandley, 781 S.W.2d 886, 894 (Tex. Crim. App. 1989), reh'g denied (1990) ("Although any of these incidences alone might not support applicant's claim, there can be no doubt that the cumulative effect of the investigative procedure, judged by the totality of the circumstances, resulted in a deprivation of applicant's right to due process of law by suppressing evidence favorable to the accused, and by creating false testimony and inherently unreliable testimony").

conceal evidence that numerous State's witnesses had been given or promised special treatment in return for their cooperation with the prosecution, thereby flouting Giglio v. United States, 405 U.S. 150 (1972). Further, the prosecutors fabricated inculpatory evidence against Mr. Spence, and knowingly presented false testimony in violation of the constitution. Napue v. Illinois, 360 U.S. 264 (1959); see also Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1988).

In an additional bizarre instance of misconduct, district attorney Vic Feazell was caught writing furtive notes to Mr. Spence during voir dire. See S.F. (voir dire) Vol. XIV at 3286-3341 and related exhibits. See also Petition for Writ of Habeas Corpus, Exhibit P (Feazell notes). Feazell's notes ridiculed defense counsel Walter Reaves and Bill Vance (e.g., "Your lawyer needs to wake up!"), and warned Mr. Spence that his attorneys' incompetence would cost him his life ("You're drowning fast -- and your lifeguards don't swim!"). Id. Caught interfering with Mr. Spence's attorney-client relationship, Feazell first lied to the trial court, denying having written any notes at all. After his initial blustering denials fell on deaf ears, Feazell awkwardly shifted gears and claimed that he had written the notes in jest. Defense counsel moved for a mistrial based on Feazell's misconduct, which motion the trial court denied. Mr. Spence's protests at this misconduct, and his assertions that Feazell's actions had destroyed Mr. Spence's relationship with his attorneys, were rejected by the trial court (and, later, by the

Texas Court of Criminal Appeals).[51]

Feazell's outrageous misbehavior was intended to, and did, both undermine Mr. Spence's confidence in his attorneys and interfere with the attorney-client relationship. As defense counsel Walter M. Reaves, Jr., has described under oath the effect of Feazell's antics:

> During voir dire in the case, the District Attorney, Vic Feazell, showed several notes to Mr. Spence. These notes criticized my and my co-counsel's performance, and belittled Mr. Spence's chances of avoiding conviction and the death penalty. These notes undermined Mr. Spence's confidence in our abilities, and interfered with our attorney-client relationship. After he received the notes, Mr. Spence was suspicious of our motives, strategies, and skills, which damaged our ability to work together. Several times during the trial Mr. Spence tried to discharge us, but the trial court refused to appoint new counsel or permit us to withdraw from representing him.

Petition for Writ of Habeas Corpus, Exhibit O.

Even if this Court cannot conclude that Feazell's note-writing antics themselves prejudiced the outcome of the entire trial, they are representative of the farcical quality of the proceedings and well illustrate the prosecutors' complete loss of perspective and renunciation of professional responsibility in their single-minded vendetta against Mr. Spence. Under Derden, Feazell's actions in interfering with Mr. Spence's attorney-client relationship must be cumulated with the extensive record

---

[51] On direct appeal, the Texas Court held that Feazell's outrageous actions did not "violate[] appellant's right to the effective assistance of counsel or to due process or due course of law under either the Federal or State constitutions." Spence v. State, No. 69,554 (unpublished opinion), slip op. at 32.

of other acts of prosecutorial misconduct, in determining whether Mr. Spence was denied a fundamentally fair trial.

In another instance, for example, prosecutor Feazell intentionally violated a pre-trial protective order by giving an interview to a local newspaperman. See Petition for Writ of Habeas Corpus, Exhibit Q. The front-page banner-headline story that immediately (and predictably) followed was full of Feazell's inflammatory and prejudicial misstatements of law and fact,[52] and had its intended result -- it was read by a juror who actually sat in judgment of Mr. Spence. Such calculated misconduct, committed with the intention to prejudice Mr. Spence's rights to a fair trial and an impartial jury, demands redress in the form of habeas relief.

In Derden v. McNeel, 978 F.2d 1453 (5th Cir. 1992)(en banc), cert. denied 61 U.S.L.W. 3684 (1993), this Court established four criteria by which allegations of "cumulative error" in federal habeas corpus must be analyzed:

---

[52] The headline of the article -- which several jurors admitted seeing -- read "DAs say ... Spence need[s] second conviction." Exhibit Q. In the article, which makes extensive reference to Spence's prior capital conviction in McLennan County, Feazell is quoted as saying that he does not "believe [the prior conviction] has any (errors)," but that he is pursuing a second conviction to ensure that Spence will be executed even if the first conviction is reversed on appeal. Id. at 2. Feazell is also quoted as saying that "[p]eople are getting out of prison now on life sentences after serving ... 9 years; I've seen some violent offenders out after 12 years," id. at 1, and implicitly refers to Mr. Spence as a "violent criminal predator" and a "sociopath." Id. These quotes were plainly calculated to taint Mr. Spence's prospective Brazos County jury pool and circumvent the very reasons why the change of venue to Brazos County was granted in the first place.

(1) The claims must be based on errors committed in the state trial court;

(2) the claims must not have been procedurally barred;

(3) the claims must be federal constitutional errors, or errors of state law that rise to constitutional dimension; and

(4) that the federal court must review the record as a whole to determine "whether the errors more likely than not caused a suspect verdict."

Derden, 978 F.2d at 1458.

All of Mr. Spence's claims of state misconduct discussed above satisfy the criteria set forth in Derden. Each challenge is firmly grounded in principles of federal constitutional law, relates to errors committed in the trial court, and is not procedurally barred.[53] Further, in comparison to the claims presented in Derden, Mr. Spence's cumulative claims are all interrelated and based on the same central allegations of prosecutorial misconduct. Moreover, Mr. Spence's claims regarding the State's suppression of exculpatory evidence and the State's knowing presentation of false testimony against him concern the fundamental integrity of the State's evidence of guilt. Consequently, the nature of Mr. Spence's claims strongly indicate that cumulative error analysis is imperative in this case.

---

[53] Mr. Spence concedes that the errors that the District Court found procedurally barred cannot be "cumulated" under the analysis set forth in Derden. See Order at 29 (finding that petitioner defaulted on claims regarding State's presentation of "victim impact" evidence, misstatements of the law, inflammatory jury argument, and argument that mitigating evidence should be ignored). However, the District Court found none of the claims discussed in this Memorandum procedurally barred.

Yet, as noted above, the district court discussed each of these claims individually but failed to consider their aggregate effect. In so doing, the court failed to appreciate the essence of Mr. Spence's challenge, which asserted that he had been "denied fourteenth amendment due process by the cumulative effect of errors committed in a state trial, which together deny fundamental fairness." 978 F.2d at 1456 (emphasis added). For all the reasons discussed above, application of the Derden standard in this case compels the conclusion that the cumulative errors "more likely than not caused a suspect verdict." Under such circumstances, where the district court failed to give reasoned consideration to a potentially meritorious federal constitutional challenge, this Court should grant a certificate of probable cause to appeal.

CONCLUSION

Because of the unique nature of the legal and factual dilemmas with which the District Court has presented Mr. Spence, he urges this Court to provide him the opportunity to present full briefing on the merits in support of this application for certificate of probable cause to appeal. For the foregoing reasons, and all others that this Court might consider, the relief sought by Mr. Spence should be granted.

Respectfully submitted,

* Raoul D. Schonemann
Attorney in Charge
Texas Bar No. 00786233

* Ken D. Driggs
Texas Bar No. 00786864

* Robert C. Owen
Texas Bar No. 15371950

TEXAS RESOURCE CENTER
1206 San Antonio Street
Austin, Texas 78701
Tel.: (512) 320-8300
Fax: (512) 477-2153

* J. Patrick Wiseman
WISEMAN, DURST & TUDDENHAM
1004 West Avenue
Austin, Texas 78701
Tel: (512) 479-5017

* Member, Bar of the United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 1994, a true and correct copy of the foregoing Motion was served by first-class certified U.S. Mail upon the following:

William C. Zapalac
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711

Raoul Schonemann